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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 69.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

LEHIGH VALLEY RAILROAD COMPANY AND OTHERS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

INTRODUCTION.

This is an appeal from a decree of the United States District Court for the Southern District of New York dismissing a proceeding brought by the United States under the Anti-Trust Law, 26 Stat. 209, c. 647, to prevent the Lehigh Valley Railroad Company, in combination with certain corporations controlled by it, from continuing to restrain and monopolize interstate trade and commerce in anthracite coal produced along and transported over its

lines; and also to prevent the same railroad company from transporting in interstate commerce anthracite coal mined under its authority or in which it has an interest, contrary to the Commodity Clause of the Act to Regulate Commerce, 34 Stat. 584, c. 3591. The case comes directly from the District Court, as required by section 2 of the Expediting Act, 32 Stat. 823, c. 544.

The record is in five volumes. Volumes I and II contain, respectively, the testimony and the exhibits on behalf of the Government; Volumes III and IV, respectively, the testimony and exhibits on behalf of the defendants; Volume V, the pleadings, the opinion and the decree of the District Court, and the appeal papers.

DESCRIPTION OF DEFENDANTS.

Lehigh Valley Railroad Company, hereafter called Lehigh Railroad, is the principal defendant. It operates a railroad system extending from tidewater at New York, N. Y., and Perth Amboy, N. J., through the States of New Jersey and Pennsylvania into the hereinafter described anthracite coal fields, and thence northerly into central and western New York, terminating at Buffalo. (Pet., 5 R. 6–7; Ans., L. V. R. R., 5 R. 73, 77; Map, Govt. Ex. 24, 2 R. 627.)

The other defendants are as follows:

The Lehigh Valley Coal Company, hereafter called Lehigh Coal Company, which is engaged extensively in mining anthracite coal from lands along the Lehigh

Railroad, and is alleged to be, by reason of the ownership of its entire capital stock by Lehigh Railroad, and other arrangements, a mere department or instrumentality of the latter. (Pet., 5 R. 7, 39–40; Ans. L. V. R. R. Co., 5 R. 78; Ans. L. V. C. Co., 5 R. 96.)

Lehigh Valley Coal Sales Company, hereafter called Lehigh Coal Sales Company, which was organized in 1912 at the instance of Lehigh Railroad, and with substantially the same stockholders, to take over at the mines and to market under a certain contract the coal mined and purchased by Lehigh Coal Company and Coxe Bros. & Co. (Inc.). (Govt. Exs. 20 and 21, 2 R. 619–621; Govt. Ex. 25, 2 R. 629–630; Govt. Ex. 3, 5 R. 55–66.)

Coxe Bros. & Co. (Inc.), which is engaged in mining anthracite coal from lands along the Lehigh Railroad (Pet., 5 R. 7–8; Ans. Coxe Bros. & Co. (Inc.), 5 R. 127–8), and whose entire capital stock was acquired in 1905 and is now held by Lehigh Railroad. (Pet., 5 R. 19; Ans. L. V. R. R. Co., 5 R. 89.)

The Delaware, Susquehanna & Schuylkill Railroad Company, which operates a gathering road connecting the collieries of Coxe Bros. & Co. (Inc.), and of certain independent operators with the Lehigh Railroad and other trunk lines, and whose entire capital stock Lehigh Railroad acquired in 1905 and has since held. (Pet. 5 R. 8, 20–1; Ans. D. S. & S. R. R. Co., 5 R. 131–132; Ans. L. V. R. R. Co., 5 R. 79.)

The New York & Middle Coal Field Railroad & Coal Company, which owns and leases to others coal

lands adjacent to the Lehigh Railroad, and whose capital stock is nearly all owned by the latter. (Pet. 5 R. 8, 18; Ans. N. Y. & M. C. F. R. R. & C. Co., 5 R. 133–134; Ans. L. V. R. R. Co., 5 R. 79, 88.)

The G. B. Markle Company, which operates anthracite mines along the Lehigh Railroad, and, as successor to the firm of G. B. Markle & Company, is bound by a 30-year contract to have its entire output marketed by Lehigh Coal Company, which contract is now being executed by Lehigh Coal Sales Company. (Pet. 5 R. 8, 23–24; Ans. G. B. Markle Co., 5 R. 136–139; Ans. L. V. C. S. Co., 5 R. 113–119; Govt. Ex. 1, 5 R. 48–51.)

Girard Trust Company, to which is pledged as trustee to secure certain bonds of Lehigh Railroad the stock owned by Lehigh Railroad in Lehigh Coal Company, in Coxe Bros. & Co. (Inc.), and in Delaware, Susquehanna & Schuylkill Railroad Company. (Pet. 5 R. 8; Ans. Girard Trust Co., 5 R. 140–146, and copies of the mortgages, 5 R. 146–204, 213–221.)

And finally, the *president*, the *vice president*, and the *directors* of Lehigh Railroad, principal defendant. (Pet. 5 R. 8–9; Ans. E. B. Thomas, et al., 5 R. 222–223.)

DESCRIPTION OF SUBJECT MATTER.

The only known anthracite coal fields of any considerable commercial importance are situated in eastern Pennsylvania and embrace about 484 square miles, or 309,760 acres. (Pet., 5 R. 10; Ans. L. V.

R. R. Co., 5 R. 81.) The natural and geographical division is into four fields—the northern, eastern middle, western middle, and southern. (See maps, Govt. Ex. 136, 2 R. 1039, and L. V. C. Co. Ex. 4, 4 R. 2650.) For trade purposes the fields are divided into three "regions"—the Wyoming, coextensive with the northern field; the Lehigh, embracing the eastern middle field and that portion of the southern field east of Tamaqua; and the Schuylkill, comprising all the rest of the southern field and the whole of the western middle field. (Pet., 5 R. 10; Ans. L. V. C. Co., 5 R. 99.) The western middle field is, however, sometimes treated as part of the Lehigh rather than the Schuylkill region. (L. V. R. R. Ex. 52, 54, 4 R. 2301, 2305; Norris, 3 R. 1563.)

The railroads connecting the coal fields with the markets of the country are set forth in the petition (5 R. 10–11), and are shown to the eye on a map. (L. V. R. R. Ex. 34, 4 R. 2278.)

The spheres of influence of the several railroad companies in the anthracite fields are shown as of the year 1895 on a map which indicates specifically the outlines of coal lands controlled by Lehigh Railroad and the outlines of lands of independent operators shipping over Lehigh Railroad. (Govt. Ex. 136, 2 R. 1039.) A considerable portion of the latter, and also the whole of the Coxe lands (marked brown on the map), have since passed to the control of Lehigh Railroad.

At "breakers" at the mouth of the mines the coal is broken up and assorted into various sizes, classified as follows:

(1) Broken or steamboat. (2) Egg. (3) Stove. (4) Chestnut.	"Prepared sizes."
(5) Pea. (6) Buckwheat. (7) Rice or buckwheat No. 2. (8) Barley or buckwheat No. 3.	"Steam sizes."

The prepared sizes are the more valuable; and the freight rates are, therefore, almost invariably graded as follows: (1) On prepared sizes, (2) on pea, (3) on sizes smaller than pea.

The smaller sizes, which have come into increased use in recent years, large quantities being now recovered from old waste heaps by means of "washeries," are used for the generation of steam, principally in the large Eastern cities.

Approximately, a tenth of the anthracite mined is consumed locally at the mines (4 R. 2314); about one-fifth of the residue is shipped to market in Pennsylvania; and the rest is shipped by rail in interstate and foreign commerce. (Pet., 5 R. 11; Ans. L. V. R. R., 5 R. 81.) Shipments by canal are now insignificant. (Armstrong, 1 R. 275.) The coal is loaded by dumping into cars which are placed on tracks extending under the chutes of the breakers. Breakers controlled by Lehigh Railroad are connected with its own tracks and with those of no other railway; but the breakers at some independent collieries are connected with the tracks of two or more railroads which

compete for the tonnage. In some such cases one railroad performs a switching service for the other or others, but in other cases each railroad serves the breaker, with its own locomotives, by a simple device explained by a witness (Edwards, 1 R. 555–9) in connection with a diagram. (Gov. Ex. 143, 2 R. 1047.)

Most of the anthracite roads reach tidewater at New York Harbor, to which is transported more than 25 per cent of all the anthracite shipped to market. Lehigh Railroad's coal terminals at New York Harbor are at Perth Amboy, N. J., while some other roads reach the harbor higher up. On account of the lesser cost of water transportation from those upper ports a differential of 5 cents a ton, in a few cases 3 cents, is allowed in the freight rates to the lower ports for transshipment by water. (Grier, 1 R. 267.) Save for this allowance, and except in two cases in which the rates had been reduced by the Interstate Commerce Commission, the rates from the anthracite regions to New York Harbor at the time of the taking of testimony were, in general, the same, irrespective of the length of haul. (Grier, 1 R. 266–70, 311, and Gov. Ex. 73, 2 R. 833.)

In transportation, and particularly transshipment, a wastage occurs, technically known as "degradation," due to the breaking down of the prepared sizes into smaller sizes. This degradation amounts to about 5 cents a ton on prepared sizes, or about 3 cents a ton on the average of all coal shipped, including both prepared and steam sizes. (Tompkins, 1 R. 547, 548.)

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SUBSTANCE OF THE CHARGES.

The substance of the charge under the Anti-Trust Law is that Lehigh Railroad, in combination with Lehigh Coal Company and other controlled corporations, has unduly restricted competition and established a virtual monopoly in trade and commerce in anthracite coal produced along and transported over its lines, and has rendered impossible the competition of other railroads for the transportation of anthracite from mines connected with its road; or, as shortly stated in the petition, has monopolized the production, transportation and sale of anthracite coal from mines located along its lines;—all by acquiring control of coal mines and coal-bearing lands along its lines, by acquiring control of the output of independent producers along its lines, by exacting excessive freight rates from independent producers, by causing its power as a carrier to be so exerted as to give undue preferences and advantages to its own coal companies to the injury of independent producers, and by other means set forth in the petition.

The substance of the charge under the Commodity Clause is that by reason of the relations between the two corporations anthracite coal mined by Lehigh Coal Company must be regarded as mined under the authority of Lehigh Railroad and as coal in which Lehigh Railroad has an interest direct or indirect, and that Lehigh Railroad is transporting such coal in interstate commerce without first in good faith dissociating itself therefrom.

DECISION OF THE DISTRICT COURT.

The District Court (Judge Hough) held that neither charge was sustained, and, as above stated, dismissed the petition.

ISSUES IN THIS COURT.

The assignments of error (5 R. 234–238) embrace the following contentions, which constitute the issues in this Court:

First. Lehigh Railroad in combination with Lehigh Coal Company and other controlled corporations has acquired control of the trade and commerce in anthracite coal produced along and transported over its lines.

Second. This control was acquired and is maintained by other than normal methods of industrial development and by means wrongful and unlawful in themselves.

Third. Such control so acquired and maintained constitutes a restraint and monopolization of trade in violation of the Anti-Trust Law.

Fourth. In view of their interrelations, anthracite coal mined by Lehigh Coal Company and by Coxe Bros. & Company, Inc., must be regarded as mined under the authority of Lehigh Railroad, and as coal in which Lehigh Railroad has an interest, direct or indirect, and therefore the transportation of such coal in interstate commerce by Lehigh Railroad without first in good faith dissociating itself therefrom constitutes a violation of the Commodity Clause.

ARGUMENT.

PART I.—THE CASE UNDER THE ANTI-TRUST LAW.

I.

LEHIGH RAILROAD IN COMBINATION WITH LEHIGH COAL COMPANY AND OTHER CONTROLLED CORPORATIONS HAS ACQUIRED CONTROL OF THE TRADE AND COMMERCE IN ANTHRACITE COAL PRODUCED ALONG AND TRANSPORTED OVER ITS LINES.

Lehigh Railroad formed Lehigh Coal Company in 1875 by consolidating the Luzerne Coal & Iron Company and the Green Land Company, the capital stocks of which it had shortly before acquired for the purpose of establishing a coal department. (Ans., L. V. R. R., 5 R. 78; Ans., L. V. Coal Co., 5 R. 100; Baird, 1 R. 27–30.) At all times Lehigh Railroad has owned the entire capital stock of Lehigh Coal Company, and also has been united with it in management through certain common officers and directors (*infra*, pp. 115–118), and has largely financed its operations (*infra*, pp. 42–55; 57–60; 119–120). As tersely stated by the District Court—

> The Lehigh Valley Coal Company has from its creation done as it was ordered to do by the Lehigh Valley Railroad * * *. (5 R. 230.)

It was not until many years after the formation of Lehigh Coal Company, however, that Lehigh Railroad undertook to control and monopolize trade and commerce in anthracite coal produced along and

transported over its lines. As late as 1890 only 18.02 per cent of the anthracite transported by it was mined by companies under its dominion. (*Infra*, p. 12.)

Since that time, using Lehigh Coal Company as its principal instrumentality, Lehigh Railroad has rapidly extended its control, by the acquisition of numerous anthracite coal mining businesses and properties located along its lines, by the purchase of the output of independent producers, and by wrongfully exerting its power as a carrier so as to give Lehigh Coal Company an irresistible advantage over independent operators.

By these means, which are described more particularly in the next section, Lehigh Railroad has extended its control so far, that, first, of the limited area in which anthracite is found, 90,000 acres are now held by two corporations under its absolute control—Lehigh Coal Company and Coxe Brothers & Company (Ans., L. V. Coal Co., 5 R. 97; Ans., Coxe Bros. & Co., 5 R. 128); and, secondly, of the total tonnage of anthracite transported over its lines, amounting in 1913 to nearly 14,000,000 tons, it controls 80 per cent.

The expansion since 1890 of Lehigh Railroad's control of the trade and commerce in anthracite coal transported over its lines is shown by the following table:

TONNAGE OF ANTHRACITE COAL TRANSPORTED BY LEHIGH VALLEY R. R. 1890–1913, DIVIDED TO SHOW QUANTITY MINED BY COAL COMPANIES AFFILIATED WITH THE RAILROAD, QUANTITY PURCHASED BY THEM FROM INDEPENDENT PRODUCERS, AND QUANTITY OTHERWISE CONTROLLED BY THEM.

Fiscal year.	Total shipments.	Mined by Lehigh Valley Coal Co. and affiliated companies.		Purchased by Lehigh Valley Coal Co. from independent producers.*		Coal of Markle Co. marketed by Lehigh Valley Coal Co. under long-term contract.		Total shipments controlled by Lehigh Valley R. R. Co. through Lehigh Valley Coal Co., Coxe Bros. & Co., Lehigh Valley Coal Sales Co.**	
	Tons.	*Tons.*	*Per cent.*	*Tons.*	*Per cent.*	*Tons.*	*Per cent.*	*Tons.*	*Per cent.*
1890	[1] 8,126,629	[2] 1,464,509	18.02	[14]	.....	[14]	.....	[14]	.....
1895	[3] 12,045,368	[4] 2,619,960	22.56	[5] 3,217,912	26.71	[13] 457,213	3.80	6,295,085	53.07
1900	[6] 7,761,057	[7] 2,833,136	36.55	[14]	.....	[14]	.....	[14]	.....
1905	[8] 10,574,642	[9] 5,605,987	53.29	[14]	.....	[14]	.....	[14]	.....
1907	[10] 11,482,134	[10] 6,577,364	57.29	[10] 2,589,276	22.55	[10] 835,068	7.27	10,001,708	87.11
1912	[11] 11,085,858	[11] 6,733,763	60.74	[11] 1,480,490	13.36	[11] 948,441	8.55	9,162,694	82.65
1913	[12] 13,909,545	[12] 8,556,103	61.52	[12] 1,317,327	9.47	[12] 1,246,654	8.96	11,120,084	79.95

* Since the annulment of the 65 per cent contracts on May 26, 1913 (Govt. Ex. 52, 2 R. 692), the purchases have been made by Lehigh Coal Sales Co. directly from the independent producers instead of through Lehigh Coal Co., as formerly (Wilson, 3 R. 1919–1924, 1974–1976).

** The figures are ascertained by computation from the figures given in the preceding columns. Does not include coal shipped by lessees of Lehigh Valley Coal Co. whose shipments are controlled by routing clauses, unless they sold to Lehigh Coal Co. or Sales Co.

[1] Gross tons, 4 R. 2309–10.
[2] Gross tons, 2 R. 923.
[3] Net tons, 4 R. 2309–10.
[4] Net tons, 2 R. 927.
[5] Net tons, 2 R. 928.
[6] Net tons, 4 R. 2309–10.
[7] Net tons, 2 R. 932.
[8] Net tons, 4 R. 2310.
[9] Net tons, 2 R. 940.
[10] Gross tons, Govt. Ex. 129, 2 R. 1019–1021.
[11] Gross tons, Govt. Ex. 104, 2 R. 909–911.
[12] Gross tons, Govt. Ex. 105, 2 R. 912–914.
[13] Net tons, 2 R. 928.
[14] Not given in record.

The decrease in the percentage of control between 1907 and 1913 is due wholly to a decrease in amount of coal purchased from independent operators; and this in turn is due in part to the acquisition by Lehigh Coal Company of the mines of producers whose output it had been purchasing, and in part to the annulment by this Court of the 65 per cent contracts in the case of *United States* v. *Reading Company et al.*, 226 U. S. 324.

Since March 1, 1912, the marketing of coal mined, purchased, or otherwise controlled by Lehigh Coal Company and Coxe Bros. & Company has been in the hands of Lehigh Coal Sales Company, which, as above stated, was organized at the instance of Lehigh Railroad and with substantially the same stockholders. (*Supra*, p. 3.) As will be presently shown, it is a mere instrumentality or agency of Lehigh Railroad. (*Infra*, pp. 127–141.)

II.

LEHIGH RAILROAD'S CONTROL OF THE TRADE AND COMMERCE IN ANTHRACITE COAL PRODUCED ALONG AND TRANSPORTED OVER ITS LINES WAS ACQUIRED BY OTHER THAN NORMAL METHODS OF INDUSTRIAL DEVELOPMENT AND BY MEANS WRONGFUL AND UNLAWFUL IN THEMSELVES.

Lehigh Railroad's control of the trade and commerce in anthracite coal produced along and transported over its lines was built up and is maintained by other than normal methods of industrial development and by means wrongful and unlawful in themselves.

Its whole history is permeated with illegality and characterized by a deliberate purpose "to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view." (*Standard Oil Case*, 221 U. S. 1, 76.)

Some of the acts to be mentioned were committed by Lehigh Railroad and some by Lehigh Coal Company. They are to be viewed together, however, as the acts of a single group or interest, since the railroad, as we have seen, owns the entire capital stock of the Coal Company, and absolutely dominates it. (*Supra*, pp. 2–3, 10).

1. ACQUISITIONS OF COMPETITIVE BUSINESSES AND PROPERTIES.

(a) STATEMENT OF ACQUISITIONS.

Lehigh Coal Company, as charged in the petition (5 R. 14–17) and admitted in its answer (5 R. 101), has acquired amongst others the following described anthracite lands, collieries, and mining businesses in the manner stated:

Hazelton Coal Company was organized by defendant Lehigh Railroad in 1895 to take title to anthracite coal lands in Hazelton and Beaver Meadow, Pa., acquired by Lehigh Railroad about 1868. In 1905 its entire capital stock—$665,000—was conveyed to Lehigh Coal Company in exchange for stock in the latter of equal par value; its funded debt—$724,000, all guaranteed by Lehigh Railroad—was paid by Lehigh Coal Company; its corporate existence was dissolved; and its anthracite lands, about

3,600 acres, were conveyed in fee to Lehigh Coal Company.

Westwood Coal Company held anthracite lands in Pennsylvania. Its entire capital stock—$165,000—was acquired by Lehigh Railroad prior to 1900. In 1904 it purchased the anthracite lands of the *Coal Ridge Improvement & Coal Company* after the foreclosure of two mortgages securing bond issues of $384,500, all held by Lehigh Railroad. In 1905 it was merged with Hazelton Coal Company, *supra*, the consolidation taking the name of Hazelton Coal Company.

Locust Mountain Coal & Iron Company had $550,000 of capital stock, a majority of which was acquired about 1869 by Lehigh Railroad, which thereafter from time to time added to its holdings, but as late as 1908 held only $330,900. In 1911 these shares were sold to Lehigh Coal Company for cash at their par value. At the same time Lehigh Coal Company acquired the remainder of the capital stock—$219,000—and the Locust Mountain Coal & Iron Company was dissolved, its assets, including 3,620 acres of anthracite coal lands held in fee, being conveyed to Lehigh Coal Company.

Delano Land Company was incorporated in 1872 at the instance of Lehigh Railroad to acquire a tract of anthracite lands known as the "Delano lands," comprising about 5,800 acres in Schuylkill County on which 10 collieries were then in active operation. The consideration paid was $2,000,000—$100,000 in cash and $1,900,000 in bonds of Delano

Land Company, guaranteed, principal and interest, by Lehigh Railroad. In 1891 its entire capital stock—$350,000—was turned over to Lehigh Coal Company for $100,000, and in 1900 it was merged with Lehigh Coal Company, which at the same time assumed that portion of its funded debt still outstanding—$1,104,000—and acquired its property, including 5,229 acres of land, about one-half of which was anthracite-bearing and upon which four collieries were being operated.

The *Humboldt Coal Company's* entire capital stock—100,000 shares—was sold to Lehigh Coal Company by Lehigh Railroad in 1891 for $355,000. It has since been dissolved and its anthracite lands conveyed to Lehigh Coal Company.

The entire capital stock of *Wyoming Valley Coal Company*—par value $1,300,000—was acquired in or about 1885 by Lehigh Railroad, which transferred it in February, 1908, to Lehigh Coal Company in consideration of $350,000 (par value) of Lehigh Coal Company treasury stock and the assumption by Lehigh Coal Company of the bonded debt of the Wyoming Valley Coal Company—$228,000. It owns about 1,657.3 acres of valuable anthracite lands in Luzerne County, Pa., held partly in fee and partly by perpetual lease. All these lands are now leased to Lehigh Coal Company or to other operators, and while the corporate organization of the Wyoming Valley Coal Company has been preserved, its operation and accounts have been merged with those of

Lehigh Coal Company, of which it is a mere department.

A. Pardee & Company owned and operated in competition with Lehigh Coal Company collieries Nos. 1, 3, 5, and 6 and also South Sugar Loaf colliery at Hazelton, Pa. In 1894 these collieries were purchased by Lehigh Railroad, and on November 1, 1894, transferred by it to Lehigh Coal Company.

J. C. Haydon & Company leased and operated the South Spring Mountain collieries in competition with Lehigh Coal Company. In 1894 its lease and mining equipment were acquired by Lehigh Railroad and during the same year were transferred by it to Lehigh Coal Company.

Connell Coal Company was a corporation holding about 444.6 acres of anthracite lands—132.5 acres in fee and 312.1 acres under lease—in Luzerne and Lackawanna Counties, Pa., from which it mined and sold anthracite in interstate commerce in competition with Lehigh Coal Company. Its production in 1901 was about 384,524 gross tons. In that year Lehigh Railroad bought its entire capital stock—$500,000 par value—for $900,000, and in 1905 sold the same to Lehigh Coal Company for $412,000. July 1, 1905, it was dissolved, its lands being conveyed to Lehigh Coal Company.

Seneca Coal Company was a corporation holding about 1,308.3 acres of anthracite lands in Luzerne and Northumberland Counties, Pa., from which it mined and sold anthracite in interstate commerce in

competition with Lehigh Coal Company. Its production in 1901 was about 358,626 gross tons. In that year Lehigh Railroad bought its entire capital stock for $1,000,000 and in 1905 sold the same to Lehigh Coal Company for $773,000. July 1, 1905, it was dissolved, its lands being conveyed to Lehigh Coal Company.

Mineral Spring Coal Company was a corporation holding about 601.5 acres of anthracite lands in Luzerne County, Pa., from which it mined and sold anthracite in interstate commerce in competition with Lehigh Coal Company. January 27, 1902, Lehigh Railroad, already the owner of a majority of its stock, acquired the remainder—$104,100—and became its sole stockholder. In 1904 all of its stock—$300,000 par value—was conveyed to Lehigh Coal Company in exchange for an equal amount (par value) of the stock of the latter. Thereafter it was dissolved and its lands conveyed to Lehigh Coal Company.

Righter Coal Company.—Thomas M. Righter & Company, a partnership, held about 200 acres of anthracite lands in Columbia and Northumberland Counties, Pa., from which it mined and sold anthracite in interstate commerce in competition with Lehigh Coal Company. Its output in 1901—chiefly from the Mount Carmel colliery at Mount Carmel—was about 188,606 gross tons. In 1902, at the instance of Lehigh Railroad, the partnership was changed to a corporation—the Righter Coal Company—with capital stock of $300,000, all of which

was sold to Lehigh Railroad, the latter giving in part payment its purchase money bonds for $270,000. In 1905 this stock was conveyed to Lehigh Coal Company for certificates of indebtedness in the sum of $292,000. July 1, 1905, Righter Coal Company was dissolved and its entire assets transferred to Lehigh Coal Company.

Warriour Run Mining Company was a corporation holding about 191.6 acres of anthracite lands in Luzerne County, Pa., from which it mined and sold anthracite in interstate commerce in competition with Lehigh Coal Company. Its output in 1904 was about 193,466 gross tons. In that year its entire capital stock was purchased by Lehigh Railroad for $1,000,000 and sold to Lehigh Coal Company for certificates of indebtedness amounting to $998,000. July 1, 1905, it was dissolved and its entire assets conveyed to Lehigh Coal Company.

Wyoming Coal & Land Company was a corporation holding in fee about 134.5 acres of anthracite lands in Luzerne County, Pa., from which it mined and sold anthracite in interstate commerce in competition with Lehigh Coal Company. Its output in 1904 was about 76,449 gross tons and had at times been much larger. In 1905 its entire capital stock was acquired by Lehigh Railroad and turned over to Lehigh Coal Company for certificates of indebtedness in the sum of $130,000 and the payment by the latter company of the bonded indebtedness of Wyoming Coal & Land Company—$60,000. July 1, 1905, it

was dissolved and its entire assets conveyed to Lehigh Coal Company.

Stevens Coal Company leased from Lehigh Coal Company lands at West Pittston, Pa., from which it mined and sold anthracite coal in interstate commerce in competition with Lehigh Coal Company. Its production normally exceeded 160,000 gross tons a year. March 15, 1910, Lehigh Coal Company purchased from Stevens Coal Company the surrender of its lease, and at the same time purchased its breaker, colliery improvements, mining cars, etc. The consideration given was $20,000 in cash, the assumption of the bonded indebtedness—$61,000 in 6 per cent bonds—of Stevens Coal Company, and the promise of Lehigh Coal Company to pay a royalty upon coal thereafter mined from the lands.

Mill Creek Coal Company was actively engaged in mining and selling anthracite coal at the Buck Mountain and Vulcan collieries, in Schuylkill County, Pa., on lands leased from Lehigh Coal Company. Its output in normal years was between 450,000 and 500,000 tons, most of which was sold in interstate commerce in competition with Lehigh Coal Company. On January 1, 1910, its lease expired and was not renewed, Lehigh Coal Company having adopted the policy of refusing to renew leases to its tenant operators, and wherever possible of purchasing the surrender of such leases. Lehigh Coal Company purchased the

machinery and plant of Mill Creek Coal Company and is now operating the aforesaid collieries.

Lentz & Company since 1884 had operated anthracite mines on lands leased from Lehigh Coal Company at Park Place, Delano, and Mahanoy Townships, Pa. In normal years its production was about 400,000 gross tons. In 1910 Lehigh Coal Company procured the surrender of its lease and at the same time purchased its breakers, machinery, and running supplies, payment being made partly in cash and $1,000,000 in 5 per cent bonds.

The Everhart Lands, so called, are valuable anthracite lands in Luzerne and Lackawanna Counties, Pa. For some time past Lehigh Coal Company has owned a half interest in these lands and has mined them under lease. In 1911 it purchased from the heirs of John T. Everhart an additional interest, approximating four-tenths of the whole, leaving about a one-tenth interest outstanding, the price being paid $300,000 in 5 per cent purchase-money bonds and the residue in cash.

Austin Coal Company held and mined anthracite lands under lease from Lehigh Coal Company. Its output was irregular but frequently exceeded 60,000 tons a year. In 1911 its entire capital stock was purchased by Lehigh Coal Company, and thereafter its lease was surrendered and the corporation allowed to go out of existence by the expiration of its charter.

Acquisition of Coxe Bros. & Co. (Inc.) and Deleware, Susquehanna & Schuylkill Railway.—This, the most

important single acquisition, was made not through Lehigh Coal Company, but directly by Lehigh Railroad. In 1905 *Coxe Bros. & Co. (Inc.)* was one of the largest independent producers of anthracite. It owned and operated the following collieries: Drifton, Stockton, Beaver Meadow, Derringer, Oneida, and Tomhicken, and also the Eckley Washery. (Ans., Coxe Bros. & Co. (Inc.), 5 R. 128.) Prior to 1905 it normally produced and sold in competition with Lehigh Coal Company, principally in interstate commerce, over 1,250,000 gross tons a year. Recently its annual production has exceeded 1,400,000 gross tons. It owns in fee or holds under long term leases about 36,490 acres of land in the anthracite-producing regions, of which it is estimated about 7,169 acres contain anthracite. (Ans., Coxe Bros. & Co. (Inc.), 5 R. 128.) Its collieries were then and are now located along the Delaware, Susquehanna & Schuylkill Railroad, through the connections of which it was able, if it chose, to send its output to market over other railroads than the Lehigh—in particular the Pennsylvania and the Philadelphia & Reading. (Ans., Coxe Bros. & Co. (Inc.), 5 R. 128.)

On November 1, 1905, Lehigh Railroad purchased from the Coxe estate for $17,440,000 the entire capital stock of Coxe Bros. & Co. (Inc.), the business of which since then has been carried on by officers and directors who are also officers and directors of Lehigh Coal Company. (Ans. Coxe Bros. & Co. (Inc.) 5 R. 128, 129.)

Delaware, Susquehanna & Schuylkill Railroad Company is a gathering line about 50 miles long connecting with Lehigh Railroad and also with the lines of the Pennsylvania Railroad Company, the Philadelphia & Reading Railway Company, and the Central Railroad Company of New Jersey. In 1905 it served the mines of Coxe Bros. & Co. (Inc.), which, as just stated, then produced over 1,250,000 gross tons a year, and also served other independent anthracite mines, to wit, the Lattimer Colliery, owned by Pardee Bros. & Co., which produced about 508,000 gross tons in 1905 and over 600,000 gross tons in more recent years, and the Harwood Colliery, owned by the Harwood Coal Company, which produced over 200,000 gross tons annually. By installing short track connections it might have served the Highland Collieries, owned by G. B. Markle & Company, with an annual output exceeding 560,000 gross tons, the Jeddo Colliery, also owned by G. B. Markle & Company, with an annual output of over 400,000 gross tons, and the Hazelbrook Colliery, owned by J. S. Wentz & Company, with an annual output of approximately 135,000 gross tons. Thus the Delaware, Susquehanna & Schuylkill Railroad connected or easily could connect about 15 collieries—including those of Coxe Bros. & Co., (Inc.)—having a total annual output exceeding 3,000,000 gross tons, with at least four different trunk lines, among them the Lehigh Railroad. (Pet. 5 R. 20–21; Ans. D. S. & S. R. R. Co., 5 R. 131.) It was, therefore, an important factor in maintaining competition between

the Lehigh and other railroads in the transportation of anthracite coal.

On November 1, 1905, at the same time that it acquired the capital stock of Coxe Bros. & Co. (Inc.), Lehigh Railroad purchased from the Coxe estate the entire capital stock of the Delaware, Susquehanna & Schuylkill Railroad. (Ans., D. S. & S. R. R., 5 R. 131.)

Since this purchase, some portions of Delaware, Susquehanna & Schuylkill Railroad, which runs in a form something like the letter Y, the whole line except one prong being paralleled by tracks of Lehigh Railroad (L. V. R. R. Ex. 77, 4 R. 2348), have been *wholly abandoned*, and other portions are used but little. (Gildroy, 1 R. 354–355.) The junction with the Central Railroad of New Jersey, being no longer of use now that the traffic is firmly tied to Lehigh Railroad, has been abandoned, and that with the Philadelphia & Reading has been allowed to become obstructed. (Gildroy, 1 R. 353, 365, 370.)

Whilst, with the exception of Coxe Bros. & Company (Inc.) and the Delaware, Susquehanna & Schuylkill Railroad, the control of the properties above described is now vested immediately in Lehigh Coal Company, they were practically all acquired at the instance of Lehigh Railroad and with its capital. (Govt. Ex. 37, 2 R. 650–1; Govt. Ex. 8–10, 2 R. 590–1; Govt. Ex. 18, 2 R. 614–6; Govt. Ex. 107, 2 R. 922, 924, 925.)

(b) ILLEGITIMATE PURPOSE OF THE ACQUISITIONS.

Moreover, it procured these acquisitions not in the normal course of developing its business, for it dis-

avows having any coal business to develop, but rather with the *purpose*, first, of obtaining for coal companies under its dominion control of the trade and commerce in anthracite coal produced along and transported over its lines; and, secondly, of excluding other carriers from competing for the transportation of the tonnage of the mines so acquired.

Thus, year after year the annual reports of Lehigh Railroad have referred to the fulfillment of its plan to grasp for its own coal companies the trade and commerce in anthracite coal transported over its lines.

For example, the report for the year ending June 30, 1903, states:

> The collieries operated by the Lehigh Valley Coal Company and affiliated companies produced during the year 56.77 per cent of the coal transported by our company, being an increase of more than 10 per cent over the previous year. (2 R. 938.)

Similar statements were made in the reports for the next three years (2 R. 938, 941). In 1906 the formula was altered so as to include the purchased coal:

> During the year the Lehigh Valley Coal Company and affiliated companies produced and purchased 85.25 per cent of the anthracite coal transported by the Lehigh Valley Railroad Company. (2 R. 942.)

This form of statement was repeated in the reports for the years 1907 (2 R. 944), 1908 (2 R. 946), and 1909 (2 R. 946).

Likewise significant of intent to monopolize is an entry in the minutes of Lehigh Railroad in January, 1905, of the recommendation by the president that the capital stock of a certain coal company should be bought at an excessive price, on the ground amongst others—

> that by its purchase an uncontrolled interest on the Lehigh Valley would be eliminated. (Govt. Ex. 115, 2 R. 609–610.)

The Interstate Commerce Commission after an exhaustive investigation has recently affirmed the existence of this intent on the part of the Lehigh and other anthracite railroads:

> It has been the policy for many years of these carriers to gain a monopoly of the production and sale of anthracite coal. (*Anthracite Rate Case*, 35 I. C. C. 220, 232.)

Indeed, this Court itself in adjudging unlawful the 65 per cent contracts entered into by the Lehigh and other anthracite roads, in effect found an intent on the part of each to monopolize trade in anthracite transported over its line. (*United States* v. *Reading Co.*, 226 U. S. 324, 367.)

That the further purpose of these acquisitions was to exclude the competition of other carriers is admitted. Indeed the president of Lehigh Railroad testified that—

> Their *sole object* in acquiring coal lands was to protect the tonnage and to secure tonnage to their own lines. (1 R. 432.) [Italics ours.]

Its secretary, who had served it for 41 years (1 R. 10), testified that its object in acquiring control of the various coal properties was not the normal one of making a profit by engaging in the coal trade but—

> to assure the tonnage from the mines on the various properties to the Lehigh Valley System,

and

> to prevent its going to some other railroad. (1 R. 504–505.)

Finally, the court below found that—

> The purpose of this acquisition * * * was to get and firmly keep the business of carrying the coal extracted from those lands. (5 R. 230.)

Plainly this is not a legitimate purpose—not a normal method of industrial development. If it were, every railroad would be free to monopolize all the produce on its lines.

That the purpose was not to make a profit by engaging legitimately in the coal trade is also shown by the results. Year after year Lehigh Railroad poured out millions of dollars to acquire coal stocks and to give financial support to companies under its control without receiving and apparently without expecting a single dollar in return in the shape of profit from the operation of the mines.

That the purchase of the stock of Coxe Bros. & Company (Inc.) and of the Delaware, Susquehanna & Schuylkill Railroad Company was not made in the normal course of business is further borne out by

the excessive price paid. (*Anthracite Rate Case*, 35 I. C. C. 220, 238.) The amounts received as dividends on the stock have been less by more than $2,000,000 than the interest on the bonds issued to pay for it. (Pet., 5 R. 20, verified with a trifling correction, Storck, 1 R. 511–512.) The loss would be still greater if allowance were made for the depletion of the mines, which has been indicated by writing down the valuation of the stock on the Lehigh Railroad books by $1,000,000 a year.[1] (Govt. Ex. 107, 2 R. 945, 947, 949.)

2. PURCHASE OF OUTPUT OF INDEPENDENT PRODUCERS, THEREBY ELIMINATING THEIR COMPETITION.

Lehigh Railroad, in pursuance of the same policy which actuated the acquisition of coal-mining businesses and properties, has also been in the habit

[1] The answer of Lehigh Railroad suggests improvements made by Coxe Bros. & Company out of earnings as explanation of the unprofitableness of the purchase. (5 R. 89.) But the amounts expended for "maintenance," even if they were all properly chargeable to capital, are too small to have any such effect. (Govt. Ex. 39, 2 R. 662.)

The defendants further suggest that the loss on the stock of Coxe Bros. & Company has been made up by a profit on the stock of the Delaware, Susquehanna & Schuylkill Railroad, which was bought at the same time and under the same contract. As no separate accounts have been kept for that railroad since 1905 (Morrison, 1 R. 399–400), an imaginary income account is produced to show what the road *would have earned* if its accounts had been kept. (Morrison, 3 R. 1367.) This imaginary account, however, refutes itself, as it would show a ratio of operating expenses to gross earnings of 21.48 per cent (Morrison, 3 R. 1368), as against a ratio of 82.90 per cent and 88.95 per cent from the actual operation of the road prior to its absorption. (Morrison, 3 R. 1368.) It would show annual net earnings of 33.5 per cent on its capital stock (Morrison, 3 R. 1371)—larger net earnings than those of Coxe Bros. & Company (Morrison, 3 R. 1372), although Mr. L. D. Smith, a director of Coxe Bros. & Company (Govt. Ex. 36, 2 R. 648) and of the Delaware, Susquehanna & Schuylkill Railroad (Govt. Ex. 23, 2 R. 626), and vice president of Lehigh Railroad (Govt. Ex. 22, 2 R. 622), testified that the stock of Coxe Bros. & Company was "by far the more valuable." (3 R. 1278.)

of purchasing at the mines through its subsidiary coal companies the entire output of certain independent producers of anthracite, the price for the prepared sizes since 1901 being 65 per cent of the contemporaneous average prices f. o. b. New York Harbor. (Govt. Ex. 116, 2 R. 968–969; Govt. Ex. 117, 2 R. 970; and admission of counsel, 1 R. 494–495.)

Although the system of 65 per cent contracts, running for the life of the mines and negotiated by the several anthracite railroads in combination, was held by this Court to violate the Anti-Trust Act (*U. S.* v. *Reading Co.*, 226 U. S. 324), nevertheless, purchases from many of the operators with whom such contracts were in effect have continued to be made by Lehigh Coal Sales Company at the same or even a higher scale of prices, though under agreements revocable on short notice by either party. (Wilson, 3 R. 1920–1923.)

It is shown further on (*infra*, pp. 32–38) that during most of the time these purchases were not profitable. Immediate profit was not their primary object. They were made to prevent competition. As said by this Court of the similar purchases under the 65 per cent contracts, their purpose was to withdraw the purchased coal "from competition, either in interstate transportation or sale." (*United States* v. *Reading Co.*, 226 U. S. 324, 367, 371.)

Partly in consequence of the annulment of the 65 per cent contracts and partly as a result of the acquisition by Lehigh Coal Company of the stock

or property of companies whose output it had been purchasing, the amount purchased from independent operators by Lehigh Coal Company or Lehigh Coal Sales Company declined from 3,217,912 tons in 1895 (2 R. 928) to 1,317,727 tons in 1913 (2 R. 913).

Besides purchasing the output of independent operators, Lehigh Coal Company acts as exclusive selling agent for the G. B. Markle Company, successor to the firm of G. B. Markle & Company, one of the largest producers of anthracite on the Lehigh Railroad, under a contract running for thirty years and still in force. (5 R. 48–51 and Markle, 3 R. 1593.)

According to the practice under this contract, Lehigh Coal Company transmits the orders to the Markle Company with routing directions prescribed by the former (Markle, 3 R. 1594–5). Lehigh Coal Company also pays the freight charges (Markle, 3 R. 1595), and bears all losses, whether from degradation (Markle, 3 R. 1600), or from defaults on the part of the purchaser (Markle, 3 R. 1597–8). Lehigh Coal Company may also require the Markle Company to curtail its output. (Contract, Art. 5th, 5 R. 51.) The contract, therefore, gives Lehigh Coal Company virtually the same control of the output as an outright sale, and the coal is classified by Lehigh Railroad itself as purchased coal. (Miller, 1 R. 66.)

The contract was executed at a time when Lehigh Coal Company owned a large interest in G. B. Markle & Company (2 R. 1024–5), and took the place of a previous contract expiring January 1,

1890, which expressly provided that the output should be shipped exclusively over the Lehigh Railroad (4 R. 2191). After the execution of the present contract, Lehigh Railroad permitted Lehigh Coal Company to sell its interest in G. B. Markle & Company, feeling, as the directors reported to the stockholders, that Lehigh Railroad was "*retaining, however, the sale and transportation of the coal during the life of the leases as heretofore.*" (2 R. 926.)

Since March 1, 1912, Lehigh Coal Sales Company has performed this contract as subagent or deputy of Lehigh Coal Company; but the Markle Company refuses to assent to a novation. (Markle, 3 R. 1598, 1600–1601.)

The Markle Company produces more than one million tons yearly and is the largest producer of anthracite on the Lehigh Railroad other than Lehigh Coal Company and Coxe Bros. & Company, Inc. (2 R. 912–4). It owns the tracks under its breakers (Markle, 3 R. 1601–2), which, although now connected with the Lehigh Railroad alone, yet by the construction of short spurs might be reached by the Pennsylvania Railroad and the Central Railroad of New Jersey. (Markle, 3 R. 1601–2.) But all competition for the transportation of its tonnage, and all competition with Lehigh Coal Company in the sale of its output, is necessarily suppressed by the above-mentioned agency contract.

3. PURCHASE OF OUTPUT OF INDEPENDENT PRODUCERS AT UNPROFITABLE PRICES, THEREBY EXCLUDING OTHER DEALERS FROM PURCHASING.

Prior to 1901 Lehigh Coal Company purchased large quantities of coal from independent dealers at 60 per cent of the tidewater prices. At this period the freight collected by Lehigh Railroad was 40 per cent of the tidewater prices for the time being. (Thomas, 1 R. 460; Grier, 1 R. 312.) Since, therefore, 60 per cent of the tidewater prices went to the vendor-operator and 40 per cent to Lehigh Railroad as freight, nothing whatever was left to reimburse Lehigh Coal Company for the degradation in transit and for the cost of selling and handling. For example, in 1894 Lehigh Coal Company lost 11.76 cents per ton on all the coal it purchased. (Tompkins, 3 R. 1696–1697; Govt. Ex. 114, 2 R. 967.)

Even since 1901, when the 60 per cent contracts were replaced by 65 per cent contracts and the "adjusted" or percentage freight rates were replaced by flat rates, much of the coal purchased by Lehigh Coal Company has been bought at prices too high to pay the cost of selling and handling and the loss due to degradation and the freight rate to place of resale. (Pet., 5 R. 22–23; verified, Storck, 1 R. 512–513; Govt. Ex. 126, 2 R. 998–1000; see also tabulations in Appendix C, *infra*, p. 146.)

Lehigh Coal Company could make purchases at so high a price only because the loss to itself was counterbalanced by the profit to Lehigh Railroad in the transportation of the coal. No other dealer in

coal could afford to pay so high a price, and therefore the inevitable tendency was to exclude other dealers from that part of interstate commerce consisting in buying coal at mines on the Lehigh Railroad, shipping the same over that railroad, and selling it in interstate commerce.

In the *New Haven Case*, 200 U. S. 361, this Court held that the necessary effect of such a practice on the part of a railroad company is to monopolize a part of interstate commerce (pp. 392–393):

> If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity as dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier.

It makes no difference that the purchase and resale are made not by the carrier itself but by a coal company all of whose stock it owns. This was settled by *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 43–44, where this Court held that evidence as to these very 65 per cent contracts of Lehigh Coal Company was relevant upon the issue whether Lehigh Railroad was through them departing from its published rates.

So, also, the Interstate Commerce Commission, as early as 1891 in the *Coxe Case*, 4 I. C. C. 535, denounced this same practice of Lehigh Coal Company as unfair competition and a violation of the Act to regulate commerce (4 I. C. C. 572; 2 R. 800–801):

> Every such transaction, being in effect the same as if done directly by the road in its own name, is an undue preference to the disadvantage of its customers who sell in the same markets in competition with the coal company.

The defendants contend, however, that the prices obtained *elsewhere than at New York Harbor* for the coal purchased at the mines on the 65 per cent basis were high enough to net a profit, and that this profit was sufficient to offset the loss on so much of the purchased coal as was sold at tidewater; but they admit that losses on the purchased coal, which occurred at tidewater practically all of the time, occurred everywhere, even at line points, upon steam sizes every month in the year and upon all sizes some months in the year. (Tompkins, 3 R. 1698; L. V. C. Co., Ex. 10, 4 R. 2656–2658.)

There were, however, many important markets besides New York Harbor at which coal purchased on the 65 per cent basis could only be sold at a loss. On November 1, 1906, Mr. Fowler, president of the New York, Ontario & Western Railway Company, wrote as follows to Mr. George F. Baer, a director of

Lehigh Railroad, who seems not to have denied the facts stated (Govt. Ex. 80; 2 R. 840–841):

> I am advised, and have long been of the belief myself, that when the question is presented the courts will hold that where the coal company and the railroad company have a common ownership and control, and the price received for the commodity is less than the cost of delivery, including transportation, that the transportation is a deviation from the tariff rate.
>
> * * * * *
>
> No company can buy coal on that basis (i. e., the 65 per cent basis), pay the full tariff rate, and get back out of the coal purchased its cost.
>
> That I know is true of our own companies. *I know also that it is true of the Lehigh Valley.* [Italics ours.]

A year later, September 24, 1907, W. T. Grier, coal freight agent of Lehigh Railroad, wrote as follows to T. N. Jarvis, second vice president, in reference to a proposed reduction by the Delaware & Hudson Company of its anthracite rates to Albany and to New England points (Govt. Ex. 92, 2 R. 854–855):

> They are buying coal from independent shippers on basis of $3.25 per gross ton and they claim that the present selling price at points on the Rutland Railroad and Central Vermont Railway, less the present established rates which *we and all the other anthracite lines* have in effect to that territory, yields less than $3.25 per gross ton at the mines, and it is the

> contention of the D. & H. law department, their views being based upon their interpretation of the so-called "Chesapeake & Ohio—New Haven" case decided by the United States Supreme Court February 19, 1906, that under this decision it is illegal for the Delaware & Hudson Company to sell coal at a delivered price and pay a freight rate that yields less than the price that they pay the operators for the coal at the mines. [Italics ours.]

But if it were true that losses on the resale at New York Harbor of the coal purchased on the 65 per cent basis were counterbalanced by profits elsewhere, the charge of monopolizing would not be answered, for the fact would remain that other dealers would be excluded from purchasing coal at the mines for resale at New York Harbor, even though they might be able to resell elsewhere. The part of interstate commerce consisting in buying at mines on the Lehigh Railroad and reselling at New York Harbor would still be monopolized. One independent dealer testified as follows (McTurk, 3 R. 1847, 1849):

> Q. Is the New York market a good one for the sale of anthracite?—A. Not for us individuals. We do not consider it so. We never come to the New York market unless there is a very great shortage of coal.
>
> * * * * *
>
> Q. What do you mean by saying that New York was not a good market for "us individuals," I think you said?—A. "Us individuals," because we simply get more money

at other points. The individual will not put his coal in a low market unless he is compelled to.

Q. But the railroad companies do?—A. The railroad companies do, yes; they apparently do; they are supplying the market.

Q. But you sell some coal in New York, too?—A. No, only in a shortage, or use it as a dumping ground.

It follows that independent dealers purchasing coal at mines on the Lehigh Railroad are excluded from the greatest single anthracite market in the country. (Govt. Ex. 144, 2 R. 1056; L. V. R. R. Ann. Rep. for 1895, Govt. Ex. 107, 2 R. 928; *Lackawanna Case*, 238 U. S. 516, 521.)

Again, even according to the defendants' own figures, the profit on all coal purchased in the Wyoming region on the 65 per cent basis during the year 1907 was only $33,209 on some 800,000 tons (4 R. 2656–8), or about 4 cents a ton. It is unlikely that dealers who were not interested in the tolls collected for transportation of the coal could live on so small a margin of profit.

Finally, the practice of reselling the purchased coal at less than cost plus the expense of selling and handling, the amount of degradation in transit, and the published freight rate to the place of resale, was illegal *in and of itself* as a departure from the published freight rates (*New Haven Case*, 200 U. S. 361; *Baird Case*, 194 U. S. 25, 43–4); and the illegality of departing from the published rates at tidewater by

selling at less than the cost price plus the freight rate could not be in any way purged by adhering to the published rates at other points or at particular seasons. Any individual shipment at less than the sum of the cost price, the expense of selling and handling, and the published freight rate is illegal in and of itself under the Act to regulate commerce, in addition to being a means of monopolizing.

> * * * The deliveries under the contract came under the prohibition of the statute *whenever* for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates. (*New Haven Case, supra*, p. 398.) [Italics ours.]

4. EXCESSIVE FREIGHT RATES.

"No more powerful instrument of monopoly could be used than an advantage in the cost of transportation." (*Swift & Co.* v. *United States*, 196 U. S. 375, 402.)

It is obvious that excessive freight rates, even though ostensibly adhered to, work enormously to the advantage of the railroad coal companies. If excessive freight rates swept the profits of Lehigh Coal Company into the treasury of Lehigh Railroad,

money was merely transferred from one pocket to the other: it made no difference to the Lehigh companies as a group. Means were always available to replenish the treasury of Lehigh Coal Company.

But the independent operators, subjected to excessive rates, were seriously handicapped, if not ruined; for, unlike the railroad coal companies, they did not have the treasuries of the railroads to fall back upon.

The long struggle between the independent shippers and the anthracite railroads over freight rates was discussed at length by Mr. Justice Lurton in the former *Reading Case* (226 U. S. 324). The effect of unreasonable rates in the building up of the railroad coal companies was stated as follows (p. 359):

> * * * obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. *If the rate of freight to tidewater was onerous and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants.* Therefore it was that the higher the freight rate, the greater the inducement to sell to the carrier companies. [Italics ours.]

That the anthracite rates charged by Lehigh Railroad have long been excessive has very recently

been authoritatively decided by the Interstate Commerce Commission after a most thorough investigation of the rates and practices of all the anthracite railroads, in which they brought out every possible fact and circumstance in their favor. (*Anthracite Rate Case*, 35 I. C. C. 220.) This adjudication, which is in accord with earlier decisions (*Coxe Bros. Coal Co.* v. *Lehigh Valley R. Co.*, 4 I. C. C. 535;[1] *Meeker* v. *Lehigh Valley R. Co.*, 21 I. C. C. 129; 23 I. C. C. 480;[2] *Lehigh Valley R. Co.* v. *U. S.*, 204 Fed. 986;[3] *Marian Coal Co.* v. *D., L. & W. R. Co.*, 24 I. C. C. 140; 25 I. C. C. 14) and has been reaffirmed by later decisions (*Red Ash Coal Co.* v. *Central R. Co. of N. J.*, 37 I. C. C. 460; *Plymouth Coal Co.* v. *Lehigh Valley R. Co.*, 36 I. C. C. 143; *G. B. Markle Co.* v. *Lehigh Valley R. Co.*, 37 I. C. C. 441; *Plymouth Coal Co.* v. *D. L. & W. R. Co.*, 37 I. C. C. 457), concludes the question and renders unnecessary any discussion of the evidence offered on that point in the present case, which was all before the Commission. (*Interstate Commerce*

[1] The commission undertook not merely to declare the existing rates unreasonable but also to fix maximum rates for the future. A petition to require the Lehigh Railroad to observe the rates so fixed was dismissed by the Circuit Court (74 Fed. 784). Before the case was reached in the Court of Appeals the decision of this Court in the *Cincinnati Freight Bureau Case*, 167 U. S. 479, made it quite clear that the Commission had no power, as the law then stood, to prescribe reasonable rates for the future, and therefore the appeal was withdrawn (82 Fed. 1002). But in declaring the existing rates unreasonable the Commission acted within its jurisdiction, and *that portion* of its decision was not affected by the courts.

[2] In the *Meeker Case* the Commission awarded reparation back as far as 1901 for rates charged by the Lehigh Valley Railroad, and the reparation order was finally enforced by this court. (*Meeker & Co.* v. *L. V. R. Co.*, 236 U. S. 412.)

[3] In this case the Commission's order reducing the rates on Lehigh Railroad was sustained by the Commerce Court, from whose judgment the railroad did not appeal.

Commission v. *L. & N. R. Co.*, 227 U. S. 88; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541.)

What is more, the Commission also found that the rates were made unreasonable *with the express purpose and effect* of giving to each anthracite railroad a monoply of the coal produced along its line. Thus:

> The evidence in this case conclusively shows that the rates on this commodity were established at an excessive basis, and clearly it was so done for the *purpose of eliminating the independent output as a factor of competition* in the markets with the railroad interests' output. (232.)
>
> * * * * *
>
> It has been the policy for many years of these carriers to gain a monopoly of the production and sale of anthracite coal. Those whose property they coveted were at their mercy, as they must either pay the toll in freight rates which these carriers chose to exact or accept the price for their product which the carriers or their coal companies elected to pay. (232–233.)
>
> * * * * *
>
> The carriers for many years were allowed a free hand in the institution of freight rates. It is evident that they used that great power not with the view of establishing reasonable freight rates, but with the *intent to establish rates on this commodity that were high enough to remove the production of the independent*

operators from the field of competition with the coal mined by the railroad interests. (233.)

* * * * *

Reviewing this whole series of transactions, they seem merely parts of a plan to publish in tariff form *rates which were excessive and which presented a barrier against the successful shipping by the small shipper*, the independent operator, and then, by methods which in effect were secret, to reduce those published rates on the shipments of the coal company that had railroad affiliations. (242.)

* * * * *

the smaller shipper could not obtain as much as cost for his coal if he paid the tariff rates which were established, * * * (247.)

* * * * *

The maintenance of excessive freight rates on this commodity confiscates the property of the individual operator, and *by the imposition of excessive freight rates these public agencies have brought under their control the shipping and marketing of the greater portion of the total production of anthracite coal.* (247–248.) [Italics ours.]

5. REBATES AND OTHER PREFERENCES AND ADVANTAGES GRANTED BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY AND OTHER AFFILIATED COAL COMPANIES.

(c) ADVANCES BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY WITHOUT INTEREST OR AT INADEQUATE INTEREST.

At least until 1902 Lehigh Coal Company almost invariably suffered an annual deficit (Govt. Ex. 114, 2 R. 967), borne each year by advances from Lehigh Railroad equal to the amount of the loss. As stated in the Annual Report of Lehigh Railroad for 1901:

> Under the existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations. (2 R. 934.)

Enormous debts from Lehigh Coal Company to Lehigh Railroad have thus accumulated, amounting at times to more than $11,000,000, and the use of these vast sums was accorded to Lehigh Coal Company virtually interest free. (2 R. 1029.) Similar though smaller advances without interest were made to various other subsidiary coal companies. (2 R. 1026–1030; Morrison, 1 R. 207–208.) The extent of these preferences to controlled coal companies is shown below in tabular form:

TABLE SHOWING INTEREST WAIVED BY LEHIGH RAILROAD ON ADVANCES TO CERTAIN COAL COMPANIES ON OPEN ACCOUNT.

[Compiled from Govt. Ex. 132, 2 R. 1026–32.]

Name of debtor company.	Period during which advances were outstanding.	Average amount of advances outstanding.[1]	Total interest accrued (being simple interest at the legal rate of 6 per cent on the average amount of the advances).	Total interest collected.	Interest waived (being difference between interest accrued and interest collected).
Lehigh Valley Coal Co.	1875-1901	$5,469,643	$8,928,122	$826,992	$8,001,589
Green Land Co.	1872-1874	1,646,806	291,041	102,989	188,041
Luzerne Coal & Iron Co.	1870-1874	675,195	231,356		231,356
N. Y. & M. C. F. R. R. & Coal Co.	1872-1890	3,708	4,227		4,227
Connell Coal Co.	1901-1902	218,052	29,247		29,247
Westwood Coal Co.	1901-1904	42,443	10,186		10,186
Anthracite Coal & Imp. Co.	1889-1900	7,134	5,136		5,136
Humbolt Coal Co.	1870-1881	2,378	2,420		2,420
Total					8,493,178

[1] Averaged from the figures in Govt. Ex. 132, showing the amount of the advances outstanding at the close of the fiscal year.

In the aggregate, a principal sum of at least $33,594,851 has been thus advanced to Lehigh Coal

Company alone, of which less than a third has been paid back in cash, while nearly $6,000,000 has been forgiven outright, and more than $17,000,000 has been funded by accepting in satisfaction bonds or certificates of indebtedness of Lehigh Coal Company, thus merely changing the form of the debt. (See Appendix A, *infra*, p. 143.)

Of the bonds thus acquired by the funding of these advances, some have been sold by Lehigh Railroad at a loss after having been guaranteed by it both as to principal and interest (Morrison, I R. 397–9, 401–2), while the interest upon others has been waived and forgiven by Lehigh Railroad, as shown in tabular form below:

TABLE SHOWING INTEREST WAIVED BY LEHIGH RAILROAD ON CERTAIN BONDS OF LEHIGH COAL COMPANY, ETC., HELD BY IT.

[Compiled from information given in the evidence. Exhibit [illegible] (2 R. [illegible]), except where otherwise expressly noted.]

Name of bond.	Rate of interest nominally carried.	Period held.	Average amount held.[a]	Total interest that would have been earned for the respective periods at the specified rate, on the average amount held.[b]	Total interest actually received.	Interest that would be due at the rate specified between the time it was earned and interest collected.
Lehigh Valley Coal Co. 1st mtge. bonds	5 per cent.	1893–1909	$9,737,250	$3,441,350	$393,000	$1,397,350
Lehigh Valley Coal Co. 2d mtge. bonds	5 per cent	1897–1909	3,000,000	2,000,000	.....	2,000,000
Lehigh Valley coll. of indebtedness	None	1903–1913	10,527,000	[illegible]	1,000,000	1,615,470
Hazleton Coal Co. bonds	5 per cent.[c]	1906–1916	1,000,000	671,430	.....	671,430
Total						5,084,070

[illegible]

a Averaged from figures given for each year (2 R. [illegible]).

b Fractions of years disregarded. The amount is computed by multiplying the interest on the average amount of bonds held by the number of years at the close of which any of the bonds were held by Lehigh Railroad.

c [illegible]

d This interest is computed at the legal rate of 6 per cent because the defendants contend that payment of some interest was always intended, although no specific rate was fixed, so that the only rate applicable would be the legal rate. In point of fact no interest was originally intended to be paid, and this intent was not changed until the date of the [illegible]. In the *Meeker Case* (*infra*, pp. 47–48), [illegible] in other cases, fractions of years are disregarded in the computation of interest accruing, the certificates having been held nearly seven full years.

In 1905, Lehigh Coal Company for various considerations issued to Lehigh Railroad $10,537,000 of its "certificates of indebtedness" containing no provision for interest and payable only at the *pleasure of the debtor*. (2 R. 658–60, 676–8.)[1] No interest was intended to be paid on them. (2 R. 664–5; *Anthracite Rate Case*, 35 I. C. C. 220, 245–6.) No interest was in fact paid for nearly seven years, until on June 8, 1911, the Interstate Commerce Commission in the *Meeker Case* characterized the transaction as a rebate.[2] Shortly thereafter, and presumably as a result of this decision, simple interest at 4 per cent was paid on the certificates for the period from June 30, 1905, to March 1, 1912, and a large portion of them were exchanged for a new issue of 4 per cent bonds of Lehigh Coal Company. (2 R. 658–60.) At that time 4 per cent was an unreasonably low rate of interest,[3] even if paid semiannually; for the current rate for much higher grade securities was higher. Thus, Lehigh Coal Company's 5 per cent bonds, even when guaranteed by Lehigh Railroad, were selling at 107, and Lehigh Railroad's own 4 per cent mortgage bonds were selling below par. (1 R. 392.)

[1] The certificates were issued in part to fund advances made upon open account, in part in exchange for 5 per cent bonds of Lehigh Coal Company, held by Lehigh Railroad, in part for securities of other coal companies which had been bought by Lehigh Railroad and were being transferred to Lehigh Coal Company, and in part for other considerations. (2 R. 655–6; and *infra*, Appendix B.)

[2] *Meeker & Co. v. Lehigh Valley R. R. Co.*, 24 I. C. C. 139, 881; 2 R. 560–4, quoted *infra*, pp. 47–48.

[3] It should also be observed that some of the certificates were issued in exchange at par for long-term bonds, carrying 5 per cent interest. See Appendix B, *infra*, p. 141.

The difference between the amount of interest finally paid on these certificates of indebtedness and a fair rate of interest thereon amounted to about $1,500,000. (Storck, 1 R. 516.) Therefore, the original discrimination in favor of Lehigh Coal Company, consisting in the failure to collect *any* interest, was by no means cured by collecting the wholly inadequate amount of interest which was actually paid at the end of more than six years, in 1912; but the difference between a fair interest and the interest paid constituted in itself an illegal rebate or discrimination in favor of Lehigh Coal Company over other shippers.

In consideration of the advances made by Lehigh Railroad on open account as above set forth Lehigh Coal Company formally undertook that all coal mined by it or its tenants should be shipped over Lehigh Railroad to the exclusion of all other means of transportation whatsoever. (2 R. 607–9, 650–2.) This formal contract was hardly necessary, however, because Lehigh Railroad can and does use the power derived from stock ownership to "dictate to these companies what lines their coal shall pass over." (Baird, 1 R. 507.) Nevertheless the contract was an agreement by one shipper to give its entire patronage exclusively to one common carrier and as such is in unreasonable restraint of trade and commerce. (*Infra* 59, 62–63.)

There can be no question but that these enormous advances without interest, and other like accommodations granted to Lehigh Coal Company by Lehigh Railroad, subsequently set forth, constitute undue

preferences, in violation of the Act to Regulate Commerce (24 Stat. 379).

As early as 1891, in *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.* 4 I. C. C. 535, the very transactions here in question were denounced by the Interstate Commerce Commission, which specifically held that for a railroad company to advance money to a shipper without collecting full interest constitutes an undue preference. The Commission said (pp. 570–571):

> The Railroad Company advances to the Coal Company nearly seven millions of dollars with which to transact its business, and for the use of which the Railroad Company receives no advantage other than such advantages as it gets from carrying the freight of the Coal Company. The value of the annual use of such advances at 5 per cent interest amounts to $350,000, nearly. This sum exceeds 10 cents per ton on all the coal shipped by the Coal Company over the lines of the Railroad Company, and is to that extent an *undue preference* given to said Coal Company, to the disadvantage of Coxe Bros. & Co. and other shippers who receive no advances. The advantage of like advances if made to complainants, estimated on their annual shipments, would exceed $100,000. [Italics ours.]

Again, in 1911, in *Meeker & Co.* v. *Lehigh Valley R. Co.*, 21 I. C. C. 129, the Commission said (p. 161):

> As noted, the Lehigh Valley Railroad Company carries amongst its assets $10,537,000 noninterest bearing certificates of indebtedness of the Lehigh Valley Coal Company. At

> 5 per cent per annum the interest on these certificates would be $526,850. *The latter sum is in all substantial respects a rebate to the Lehigh Valley Coal Company.* The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95 per cent of the coal to tidewater. If its proportion of the total traffic is the same as that to tidewater, its tonnage for 1910 was in the neighborhood of 10,500,000 tons; and the net result of the transportation as between it and its competitors was the same as if it had had its coal transported for 5 cents per ton less than the independent dealers. [Italics ours.]

In the recent *Anthracite Rate Case*, 35 I. C. C. 220, decided July 30, 1915, the Commission once more denounced such transactions:

> These concessions and offsets are as pernicious as direct rebates, and it matters little whether they are in the form of cash payments, interest charges, royalty earnings, the use of valuable property at inadequate rent, the free use of carriers' funds or credit, or other insidious means, if they confer concessions and advantages which place certain shippers in a position of preference and advantage over competitors who are also customers of these carriers. (239.)

Finally, the Circuit Court of Appeals for the Seventh Circuit has held, in a judgment which this court has refused to review by certiorari, that a loan by a carrier to a shipper at less than the prevalent rate of

interest in consideration or expectation of traffic furnished or to be furnished constitutes an illegal rebate. (*Vandalia R. Co.* v. *United States*, 226 Fed. 713, 717; certiorari denied, 239 U. S. 642.)

Lehigh Coal Company, as already mentioned, expressly covenanted in consideration of the loans made by Lehigh Railroad to ship all coal from mines owned or controlled by it over the Lehigh Railroad and connecting or forwarding lines preferred by it to the exclusion of all other means of transportation. (2 R. 650–652.)

These and similar advantages in the cost of transportation granted to Lehigh Coal Company by Lehigh Railroad were not taken into account at all by the court below in determining whether Lehigh Coal Company has unlawfully monopolized trade and commerce in anthracite coal.

(*b*) GUARANTIES BY LEHIGH RAILROAD OF BONDS OF LEHIGH COAL COMPANY.

Lehigh Railroad has repeatedly guaranteed the bonds of Lehigh Coal Company and other subsidiary coal companies in an aggregate amount of $28,000,000 or more, without further consideration than the traffic furnished by them. (Baird, 1 R. 16–7, 35; Govt. Ex. 26, 2 R. 632–633; Gov. Ex. 27; 226 U. S. 324, 349–351.)

Upon some of these guaranties Lehigh Railroad was required to pay for the eight years alone from 1895 to 1902, inclusive, as much as $4,134,029. (Pet., 5 R. 25; verified, Storck, 1 R. 513.) Some portion of this aggregate represented interest on

bonds held by Lehigh Railroad itself, which, therefore, is included in the table of interest waived by Lehigh Railroad upon bonds of its subsidiary coal companies (*supra*, p. 44), and another portion is included in the cash advances mentioned above (p. 43) made by Lehigh Railroad to its subsidiary coal companies. (Govt. Ex. 50, 2 R. 683.)

Assuming, but not conceding, that in spite of section 7 of Article XVII of the Pennsylvania Constitution of 1874 prohibiting discriminations between shippers (2 R. 1103), Lehigh Railroad, by virtue of the Pennsylvania act of 1869 (L. V. R. R. Ex. 24, 4 R. 2171), had power to make these guaranties without other consideration than the traffic to be furnished by the principal obligors, the power ceased to exist in any event after the passage of the Federal Act to Regulate Commerce (24 Stat. 379); for it is clear that such guaranties constitute preferences in favor of the railroad coal companies and discriminations against other shippers, and as such were forbidden by that statute. (*Anthracite Rate Case*, 35 I. C. C. 220, 239, quoted *supra*, p. 48.)

(c) PREFERENTIAL CREDIT TO LEHIGH COAL COMPANY FOR FREIGHT CHARGES.

Independent shippers of anthracite are required by Lehigh Railroad to pay freight charges "on a substantially cash basis" i. e., within a week or 10 days. (Morrison 1 R. 413–4.) But Lehigh Coal Company, although presented with weekly bills (1 R. 417), was allowed to postpone payment for 30, 60, or 90 days or even longer (2 R. 915–8; Morrison 1 R. 411–2). As

its freight bills averaged about $860,000 a month (2 R. 917–8), the amount overdue must have averaged over $2,000,000, and yet on this indebtedness Lehigh Coal Company paid no interest (Tompkins, 3 R. 1703).

Lehigh Coal Sales Company was for a time at least favored in the same manner as Lehigh Coal Company had been, being constantly from one to two months in arrears from the time it commenced business, March 1, 1912, until early in January, 1913. (Govt. Ex. 106, 2 R. 919; Morrison, 1 R. 412–413, 420–421.)

This course of conduct constitutes a clear discrimination against the competitors of Lehigh Coal Company within the meaning of section 3 of the Act to Regulate Commerce (24 Stat. 379), and also a departure from the published rates within the meaning of section 6 of the same Act (34 Stat. 584) and of the Elkins Act (32 Stat. 847). It was so held in the leading case of *United States* v. *Hocking Valley R. R. Co.*, 194 Fed. 234; 210 Fed. 735, C. C. A., 6th, which this Court refused to review by certiorari (234 U. S. 757). The court there said (210 Fed. 740):

> Giving to one shipper four months' time in which to raise the money, even if interest is added, while the same privilege is denied to others, is plainly a "concession or discrimination." It also must be considered a concession or discrimination "in respect to transportation"; it can not be thought that these two words in this clause of the Elkins Act pertain only to a facility of transportation; they are used in immediate connection with "rebate,"

> and so the clause must be intended to reach and affect the subject of freight payments. Whether, by this concession, it results that the property is "transported at a less rate than that named in the tariffs" is not important, because the statutory condemnation extends also to concessions "whereby any other advantage is given or discrimination is practiced." Such a discrimination might or might not be of pecuniary value to the freight payer. It is conceivable that a shipper, with sufficient working capital upon which he could not otherwise earn 5 per cent, would save money by paying cash; but it is clear that *such a system of freight credits amounts to loaning money to the shipper, and is equivalent to providing for him working capital.* To say that this can not be considered a concession, or, when unfairly practiced, a discrimination, is, we think, to deny to these words their plain meaning. [Italics ours.]

(d) LEASES OF STORAGE PLANTS BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY AT INADEQUATE RENTALS.

Lehigh Railroad has built, equipped, and leased to Lehigh Coal Company a number of valuable storage plants and other facilities for handling coal. On March 1, 1912, on the formation of Lehigh Coal Sales Company, the leases were revised by raising the rents from an average of 2½ per cent on Lehigh Railroad's valuation of the premises to 4 per cent (Foster, 1 R. 101–4); by requiring the lessee to pay taxes, maintenance, and insurance, all of which had formerly been payable by the lessor (Foster, 1 R.,

103, 158–9); and by binding the lessee expressly to route all shipments via the Lehigh Railroad (Foster, 1 R. 103, 107–8, 125–30). Prior to this change the rents were too low in many cases to pay the taxes, repairs, and insurance; even since 1912 the net return is still a third less than the 6 per cent which Lehigh Railroad in rate-making considers a "minimum fair return" (4 R. 2296); while the gross rent—i. e., including the sums paid by the tenant for taxes, maintenance, and repairs—is on an average less than 6½ per cent, instead of the 8 or 10 per cent usually considered a fair gross rent in real estate transactions. The following table gives the exact figures as to five of the more valuable of these properties:

TABLE SHOWING RENTAL RECEIVED BY LEHIGH RAILROAD FROM FACILITIES LEASED TO LEHIGH COAL COMPANY.

Location of plant.	Railroad Co.'s valuation of land & structures.	Rent prior to Mar. 1, 1912.	Rent since Mar. 1, 1912.	Taxes, repairs, & insurance (payable by lessor prior to Mar. 1st, 1912, and by lessee afterwards).	Total annual payment by lessee since Mar. 1, 1912, for rent, taxes, repairs, & insurance.	Per cent of rent to valuation prior to Mar. 1st, 1912.	Per cent of total annual payment by lessee since Mar. 1st, 1912, for rent, taxes, repairs, & insurance.
S. Plainfield.....	a $256,170	b $7,593	b $10,247	f $9,051	g $19,298	h 2.92	i 7.53
Newark.....	a 226,303	c 6,000	c 9,055	f 3,446	g 12,501	h 2.65	i 5.52
Rochester.....	a 90,101	d 1,600	d 3,604	f 2,182	g 5,786	h 1.77	i 6.42
Jersey City.....	a 71,821	c 1,600	c 2,873	f 1,176	g 4,049	h 2.22	i 5.63
Irvington.....	a 38,380	e 1,200	e 1,535	f 578	g 2,113	h 3.12	i 5.50
Total.....	682,835	17,980	27,314	16,435	43,747	2.62	6.40

a 4 R. 2449. b 1 R. 104. c 1 R. 102. d 1 R. 103. e 1 R. 101.

f The figures given are the sums paid for taxes, repairs, and insurance during the calendar year 1913. The record does not contain data from which to calculate complete figures for any other year. The figures for 1913 are ascertained by subtracting the amount of the annual rent since March 1, 1912, from the total payment of the year 1913, including rent, taxes, repairs, and insurance. (4 R. 2548).

g 4 R. 2548.

h Ascertained by computation from the data contained in the first and second columns of figures.

i A table purporting to show different and higher results (4 R. 2545) was first introduced in evidence, but the witness who prepared it having been forced on cross-examination to acknowledge it erroneous (3 R. 1999–2000), a table giving the figures here set forth (4 R. 2548) was produced and proved (3 R. 2010–30).

"The use of valuable property at inadequate rent" has been specified as one of the forms of illicit preference given by the anthracite roads to their subsidiary coal companies. (*Anthracite Rate Case*, 35 I. C. C. 220, 239; quoted *supra*, p. 48.)

On March 1, 1912, simultaneously with the execution of the leases at the increased rents, Lehigh Coal Company subleased the premises to Lehigh Coal Sales Company (for the life of the contract of that date for the marketing by the new company of Lehigh Coal Company's coal) at exactly the same rents which Lehigh Coal Company was bound to pay Lehigh Railroad. (Govt. Ex. 4. 5 R. 66–71.)

The storage plants above mentioned are the only ones on the Lehigh Railroad except those belonging to Lehigh Coal Company in fee, and all these plants—those owned by Lehigh Coal Company in fee and those leased by it from Lehigh Railroad—are leased or subleased by Lehigh Coal Company to Lehigh Coal Sales Company. (Gov't Ex. 4, 5 R. 66–71; Grier, 1 R. 329; Wilson, 3 R. 1976.) As storage plants are important facilities connected with the transportation of coal, the leasing to one shipper of the only plants on the line would be an illegal preference even if the rents were adequate. (*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 524–525.)[1]

[1] See also *Plymouth Coal Co.* v. *Lehigh Valley R. Co.*, 36 I. C. C. 140, 142, where the legality of this transaction was not passed on because the record afforded no basis for a finding.

Lehigh Coal Sales Company is the only shipper to whom Lehigh Railroad has leased a completed storage plant. For other shippers the utmost the railroad will do is to lease the bare ground with permission to the tenant to erect a plant at his own expense subject to the right of the lessor *at pleasure* to terminate the lease and retake the land and all the improvements. (Kahn, 1 R. 570–571; Grier, 3 R. 2058–2059.)

(*c*) SALES OF COAL TO LEHIGH COAL SALES COMPANY AT LESS THAN CURRENT PRICES.

Since 1901, 65 per cent of the tidewater price has been the prevalent wholesale price for anthracite coal f. o. b. mines, and Lehigh Coal Sales Company buys from independent operators about one million tons a year upon that basis, or even a higher one. (Wilson, 3 R. 1920–23; Gov't Ex. 105, 2 R. 912, 913.) Nevertheless, Lehigh Coal Company, the *alter ego* of Lehigh Railroad, has sold and is still selling its entire output (except coal consumed locally and coal reserved for the use of Lehigh Railroad as a common carrier) to Lehigh Coal Sales Company at large *discounts* from the 65 per cent scale of prices. The discount was 7 per cent for the first year that the contract of March 1, 1912, between Lehigh Coal Company and Lehigh Coal Sales Company was in force, 6 per cent for the second year, and 5 per cent for the third year. The discount is to be 3 per cent for the fourth year and 1 per cent for the fifth year. (Gov't Ex. 3, 5 R. 55, 61–62.)

The amount of this discount for the first year alone was more than $1,000,000.[1]

By these discounts Lehigh Railroad, through its *alter ego*, Lehigh Coal Company, is aiding one shipper over its road to build up trade in a campaign against competitors, since the effect is to enable Lehigh Coal Sales Company to undersell its competitors if it chooses to do so. If it be true, as asserted by two witnesses, that these discounts were given in consideration of the undertaking of Lehigh Coal Sales Company to continue in markets which for the time are unprofitable (Smith, 3 R. 1264–1265, 1280; Wilson, 3 R. 1917–1918, 1974), there is still a discrimination against other shippers. No similar allowance is paid to other shippers to enable *them* to continue in unprofitable markets.

These discounts from the prevalent market prices, given by the railroad, through an *alter ego*, to one shipper, are illegal rebates or preferences to that shipper and violate the Acts to Regulate Commerce.

Any claim that these discounts are given by Lehigh Railroad or by its *alter ego*, not as a railroad, but as a coal merchant, is untenable. (*Fourche River Lumber Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 323; *United States* v. *Union Stock Yard*, 226

[1] The average price paid by Lehigh Coal Company for coal f. o. b. mines during the year ending June 30, 1913, was about $2.83 per ton. (Gov't Ex. 48, 2 R. 681, last column.) The tonnage mined by Lehigh Coal Company and sold by it to Lehigh Coal Sales Company during that year adds up to more than 9,000,000 tons (L. V. R. R. Ex. 52, 4 R. 2301), and at the rate of $2.83 per ton on this total tonnage the amount of the discount would be about $1,200,000, or about 20 per cent on the capital stock of Lehigh Coal Sales Company.

U. S. 286, 293, 308; *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 396.) In the language of Mr. Justice Lamar, "The law will not permit such a chameleon-like change." (230 U. S. 323.) In the *Union Stock Yard Case, supra*, where the railroad, through its *alter ego*, the Stock Yard Company, gave money to a shipper, not to build up its trade in particular markets, but to build a slaughterhouse upon the railroad's line, this Court declared the transaction an illegal discrimination against other shippers.

(*f*) SALES OF COAL MINING PROPERTIES BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY AT INADEQUATE PRICES.

Lehigh Railroad in 1905 sold to Lehigh Coal Company the entire capital stock and property of Connell Coal Company and of Seneca Company for $412,000 and $773,000 par value in certificates of indebtedness (2 R. 653–655). Yet only four years before these same stocks had been bought by the Railroad for $900,000 and $1,000,000, respectively (Morrison, 1 R. 229). In the meantime the price of coal had greatly increased (2 R. 1110), and the mines in question—"William A." and "Seneca"—could not have been materially depleted, as they are still producing at an undiminished rate (2 R. 1019, 909, 912).

6. LEASES OF COAL YARDS BY LEHIGH RAILROAD TO RETAIL DEALERS ON CONDITION THAT TENANTS SHIP EXCLUSIVELY OVER LEHIGH RAILROAD.

Lehigh Railroad on January 1, 1914, had in effect 125 leases of coal yards binding the lessees to route all inbound and outbound shipments over the

Lehigh Railroad to the exclusion of all other means of transportation. A sample lease is printed in full (2 R. 640), and a partial list of those in force in 1912 is set out in the Petition (5 R. 33–35; verified, Foster, 1 R. 106). The routing covenant is expressly recited to be "in consideration of the low rental herein reserved." (2 R. 643.) The Railroad's real estate agent testified that the routing covenant was a survival from earlier days and was regarded by him as "meaningless" (Foster 1 R. 129–130, 140, 148); but as late as July, 1911, he had printed 500 copies of a form containing it (Foster 1 R. 107), and when these forms were not used he sometimes took the pains *to insert* the routing clause upon *a separate typewritten slip* (1 R. 101, 149).[1]

In many cases the rents reserved were so plainly inadequate as to require the inference that a substantial part of the consideration moving the lessor was

[1] The defense that such covenants were recognized as unenforceable is answered by Judge Rose in the District Court for the District of Maryland, in commenting on a similar contention in the very recent case of *United States* v. *American Can Company*, 230 Fed. 859, 878:

"It is said that no attention should be paid to these covenants because they were clearly illegal, and every one knew they were. One reply is that people, who were acting under the advice of about as able lawyers as were to be found anywhere, do not deliberately and repeatedly do clearly illegal things without having a purpose in so doing * * *.

"It is true that defendant has taken no legal proceedings to enforce these agreements, although the industry of one of its counsel has brought together in its brief 34 cases in which, according to him, the record shows that persons who have entered into the covenant broke it. Nevertheless, it was by no means always the idle thing the defendant now says it was. * * * In point of fact, some of its signers, perhaps many of them, believed it to be binding. Still others, and they were unquestionably numerous, having signed it, and taken money or money's worth for signing it, felt in honor bound to keep it. Such men cared nothing for what a court might say as to its legal enforceability. Their consciences enforced it as against themselves."

the revenue it expected to receive from the transportation of coal to the demised yards. The Railroad's real estate agent disclaimed such a motive, but admitted that, other things being equal, he preferred a tenant who would ship over its lines. (Foster, 1 R. 140–141.)

Early in 1914, after the system had been brought to light and when the present suit was known to be in contemplation (Smith, 3 R. 1271–1272), the routing clauses were cancelled in most of the coal-yard leases upon "advice of counsel" (Foster, 1 R. 98–99, 100, 108). As late as March, 1911, however, Lehigh Railroad specifically refused to cancel, or even permanently modify, a clause in a lease requiring certain minimum shipments via its line. (Wertheim, 1 R. 379–380; Govt. Ex. 95, 96, and 97, 2 R. 858–861.)

Agreements by shippers to give to a particular common carrier their exclusive patronage tend directly to restrain trade and promote monopoly. (*United States* v. *Great Lakes Towing Co.*, 208 Fed. 733; *Gwynn* v. *Telephone Co.*, 69 S. C. 434, 442–443; *United States Tel. Co.* v. *Central Union Tel. Co.*, 202 Fed. 66, 74; see also *United States* v. *Reading Co.*, 226 U. S. 324, 367; and *supra*, p. 46, and *infra*, pp. 61; 62–63.)

Furthermore, for a railroad company to buy up coal yards and lease them to shippers under exclusive routing contracts clearly violates the provisions of the Acts to Regulate Commerce prohibiting preferences and rebates (24 Stat. 379, sec. 3; 32 Stat. 847; 34 Stat. 587–588, sec. 6), since the granting of such a lease

constitutes a consideration given to the lessee for shipping his output over the lines of the railroad company. (*United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 308; *Cleveland, Etc., R. Co.* v. *Hirsch*, 204 Fed. 849; *Fourche R. Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 322, 323.)

7. LEASES OF COAL YARDS BY LEHIGH COAL COMPANY TO RETAIL DEALERS ON CONDITION THAT TENANTS BUY EXCLUSIVELY FROM IT.

A number of properties are let by Lehigh Coal Company to retailers under leases binding the tenants to purchase their entire supply of anthracite from it. (Pet., 5 R. 35; Ans., L. V. C. Co., 5 R. 107; Ans., L. V. C. S. Co., 5 R. 121; and 1 R. 256–257.)

The reversionary interest of Lehigh Coal Company in these premises was assigned or demised to Lehigh Coal Sales Company on March 1, 1912 (5 R. 66–72); and two of the leases have since been replaced by leases from Lehigh Coal Sales Company which contain similar clauses, binding the tenants to buy anthracite from the lessor exclusively. (Evans, 1 R. 241, 244; Burton, 1 R. 254, 258.)

Such covenants, augmenting as they do the natural advantages enjoyed by a strong corporation over weaker rivals, who are not able to build up their trade by holding and leasing real estate not used in their business, tend directly to monopoly, and are, moreover, *per se* in direct and undue restraint of trade.

On account of this tendency systems of contracts for exclusive dealing are specifically forbidden by the

recent Clayton Act (38 Stat. 730, sec. 3), and have been repeatedly enjoined in court decrees under the Anti-Trust Act. (*United States* v. *Keystone Watch Case Co.*, 218 Fed. 502; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62, 76–77; *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800; *United States* v. *Corn Products Refining Co.*, U. S. Dist. Ct. So. Dist. N. Y., decided June 24, 1916, not yet reported; *Merchants Legal Stamp Co.* v. *Murphy*, 220 Mass. 281.)[1]

Moreover, although these leases do not in terms require the coal to be transported via the Lehigh Railroad, yet, as the lessees are to deal exclusively in the coal of Lehigh Coal Company, which is procurable only via that railroad, the effect is to require traffic to be given to that road; and therefore the covenants are illegal as rebates, preferences, and departures from the published tariffs, for the same reasons set forth as to the routing clauses in leases of coal yards by Lehigh Railroad (*supra*, pp. 46–49), and in leases of coal lands by Lehigh Coal Company (*infra*, pp. 62–64).

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[1] See also the following cases in which systems of exclusive contracts were condemned when employed by powerful combinations: *Standard Sanitary Co.* v. *United States*, 226 U. S. 20, 46, 47; *Monsague* v. *Lowry*, 193 U. S. 38; *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227; *Ellis* v. *Inman, Poulsen & Co.*, 131 Fed. 182. See also *United States* v. *D. L. & W. R. R. Co.*, 238 U. S. 516.

The case of *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, is not contrary to the above doctrine, but merely holds that the purchaser of goods under such an exclusive contract can not, in order to escape payment, collaterally attack the vendor as an illegal combination or the contracts as part of an *illegal system*, but can only resist payment in case the individual contract of sale was in and of itself in violation of the law.

8. LEASES OF COAL LANDS BY LEHIGH COAL COMPANY ON CONDITION THAT TENANTS SHIP OUTPUT OVER LEHIGH RAILROAD.

The coal companies controlled by Lehigh Railroad have frequently leased coal lands to tenant operators on condition that they ship via that railroad all coal mined from the demised premises (Govt. Ex. 102, 2 R. 868–83), and sometimes from other premises as well (Govt. Ex. 102, 2 R. 869–70, 873). The primary object of these covenants was to prevent competition for the tonnage by any other railroad and to deter any other railroad from making a connection with the demised collieries. This object has been accomplished, as none of the demised collieries is connected with any other road. (Chase, 3 R. 1624–1630.) Consequently, notwithstanding testimony that no effort was made by the lessors to enforce these covenants, and that the tenants shipped "where they pleased without regard to the routing clause" (Chase, 3 R. 1619–20), the covenants were perforce observed—the tenants *could* ship by no other route;[1] and the evidence accordingly shows that not one ton from any of these collieries was shipped over any other railroad (L. V. R. R. Ex. 52, 4 R. 2301).

Leases containing such covenants not merely violate the Anti-Trust Law, as parts of an illegal plan, on the principle that "the plan may make the parts unlawful" (*Swift* v. *United States*, 196 U. S. 375, 396; *United States* v. *Reading Co.*, 226 U. S. 324, 367–368),

[1] As to the defense that everybody recognized such contracts to be illegal, see *supra*, p. 58, note, and also testimony of W. R. Coyle, 3 R. 2031.

but they restrain trade in and of themselves (*United States* v. *Reading Co.*, 226 Fed. 229, 270, 286–287).

Moreover the granting of such a lease is a thing of value given in consideration of the furnishing of traffic to the carrier. In some cases the leases expressly recite that the routing covenant is in consideration of the lease being made *"at a less rent or royalty than could otherwise be obtained"* (2 R. 869, 872, 874), and many of them reserve additional rent or royalty for every ton of coal shipped over any other railroad. (2 R. 870, 873, 875, 877, 879, 881.) In such cases clearly the carrier receives for transporting the coal in any given period the published rates less the difference between a proper rental and the rental actually paid.

Consequently, all such leases constitute undue or unreasonable preferences to the lessees as shippers contrary to section 3 of the Act to Regulate Commerce (24 Stat. 379, 380), and also violate section 6 of that Act, as amended by the Hepburn Act (34 Stat. 584, 586, 587), forbidding carriers to receive any less or different compensation than specified in the published tariffs, and section 1 of the Elkins Act (32 Stat. 847), as amended June 29, 1906 (34 Stat. 584, 587–588). (*Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849, C. C. A. 6th; *United States* v. *Union Stock Yard*, 226 U. S. 286.)

It makes no difference that the consideration moves not directly from the carrier but from a corporation which is virtually the same as the carrier and

controlled by it. (*Fourche River Lumber Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 323; *United States* v. *Union Stock Yard*, 226 U. S. 287; *United States* v. *Milwaukee Refrigerating Transit Co.*, 142 Fed. 247; 145 Fed. 1007.)

Finally, these routing clauses violate the provision in section 15 of the Act to Regulate Commerce (36 Stat. 553) expressly giving to shippers the right to designate the route over which their property shall be transported. (*United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295, 311.)

9. REFUSAL OF LEHIGH RAILROAD TO MAKE JOINT RATES FROM COLLIERIES ON OTHER LINES TO POINTS ON ITS LINES.

The policy of Lehigh Railroad is to refuse joint rates from anthracite collieries on other roads to destinations on its own line, and this is avowedly for the purpose of "preserving the markets on the Lehigh Valley Railroad for the use of the people who themselves were on the Lehigh Valley Railroad" (Grier, 1 R. 348, 332), chief among whom is Lehigh Coal Company or Coal Sales Company.

Although several hundred joint rates are in effect from collieries on the Lehigh Railroad to points on other railways (4 R. 2374–2377), yet almost no joint rates are in force *to* points on the Lehigh Railroad *from* anthracite collieries on other roads. The few apparent exceptions are explained in a table, Appendix D, *infra*, p. 151. The only anthracite switching tariff (Grier, 1 R. 347) is in force at comparatively few towns (4 R. 2543–2545), and practi-

cally no anthracite is moved thereunder (Dousman, 3 R. 1316). The only other means by which a person on the Lehigh Railroad can get anthracite from collieries on other roads is the mileage tariff (Grier, 1 R. 582; Govt. Ex. 151, 2 R. 1108–1109; Grier, 1 R. 582; 3 R. 1960), which is practically prohibitive (Grier, 3 R. 1960; Kahn, 1 R. 577).

This policy of "encouraging home industries" by refusing joint rates to producers on other roads has been repeatedly condemned by the Interstate Commerce Commission. (*Lumber Rates from Texas, etc.*, 28 I. C. C. 471; *Star Grain, etc., Co.* v. *Atchison, etc., Ry. Co.*, 14 I. C. C. 364, 367; *Hughes Creek Coal Co.* v. *Kanawha & Michigan Coal Co.*, 29 I. C. C. 671, 676.)

In the first case the headnote correctly states the ruling as follows:

> A carrier should not be permitted to retain to itself the lumber market at points on its line for the benefit of producing points on its line, to the exclusion of producing points on other lines. (28 I. C. C. 471.)

In the *Hughes Creek Case* the Commission said (29 I. C. C. 676):

> This policy in essence seems to be one of endeavor to keep the movement of coal on the line of the Chesapeake & Ohio confined solely to coal originating entirely on its own line so that the road's revenue may be as large as possible. Its consequence is, of course, as contended by the complainants, to shut neighboring mines out of markets reached by the Chesapeake & Ohio and its connections

and therefore to monopolize these markets so far as the Kanawha district is concerned for the Chesapeake & Ohio coal. Such an effort in the cases of other roads in other places this Commission has on a number of occasions condemned.

In general, a carrier has the right to select its own through-route connections and to make such joint rates only as it pleases (subject now to the authority of the Interstate Commerce Commission), but when it exercises that right in aid of monopoly it violates the Anti-Trust Law. (*United States* v. *Pacific & Arctic Co.*, 228 U. S. 87.)

10. DUAL AND INCONSISTENT POSITION OF LEHIGH RAILROAD AND LEHIGH COAL COMPANY AND LEHIGH COAL SALES COMPANY AS PUBLIC CARRIER AND PRIVATE SHIPPER.

Apart from specific statutory prohibitions, such as those in the Pennsylvania constitution, Art. XVII, sec. 5 (2 R. 1102), and in the Commodity Clause of the Act to Regulate Commerce, a union of the functions of public carrier and private shipper, generally speaking, is unnatural and against public policy, so that a combination or monopoly brought about by that means can not be justified as a normal result of industrial development. See *Attorney General* v. *Great Northern Ry. Co.*, 29 Law Journal, N. S. Eq., 794, and the *New Haven Case*, 200 U. S. 361, 393–395, discussed *supra*, p. 33, and *infra*, pp. 70–74.

So the Interstate Commerce Commission in an early case against Lehigh Railroad, after quoting the provision in the Constitution of Pennsylvania pro-

hibiting carriers from engaging in mining or manufacturing articles for transportation over their works, pointed out that the necessary tendency of uniting the functions of transporting and shipping is the suppression of competition, saying:

> The tendency of all such interested management as is indicated by the above constitutional provisions is *towards the destruction of legitimate competition*, whether the interest is in the carrier or in its officers and those who direct and control it. (*Coxe Bros.* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. 535, 568; 2 R 762, 797.) [Italics ours.]

This Court has twice within the recent past declared the position of public carrier to be "inconsistent" with that of private shipper. (*D. L. & W. R. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States* v. *D. L. & W. R. R. Co.*, 238 U. S. 516, 525.)

The union of these inconsistent functions of public carrier and private shipper through the purchase by a trunk line railroad of coal properties along its line must be distinguished from the union arising from the construction by a land owner of a short lateral railroad in order that the produce of his lands may have access to a trunk line railroad or other transportation outlet. The construction of Lehigh Railroad's lines in the coal regions took place almost wholly prior to 1870 (Wilgus, 3 R. 1185–1186), and therefore antedated most of its purchases of coal properties, which had scarcely made a beginning at that date.

Many of the unfair practices and illegal discriminations hereinabove enumerated had their origin in this inconsistent relation of public carrier and private shipper.

III.

THE CONTROL ACQUIRED AND MAINTAINED BY LEHIGH RAILROAD IN COMBINATION WITH LEHIGH COAL COMPANY THROUGH THE MEANS AFORESAID OVER THE TRADE AND COMMERCE IN ANTHRACITE COAL PRODUCED ALONG AND TRANSPORTED OVER THE LINES OF LEHIGH RAILROAD CONSTITUTES A RESTRAINT AND MONOPOLIZATION OF TRADE IN VIOLATION OF THE ANTI-TRUST ACT.

If the two propositions next preceding have been established, i. e., first, if Lehigh Railroad in combination with Lehigh Coal Company has acquired control of the trade and commerce in anthracite coal produced along and transported over its lines, and, second, has done so by other than normal methods of industrial development, the illegality of such control follows as a necessary consequence; for the decisions of this Court leave no room for doubt that a combination which obtains control of any part [1] of interstate or foreign commerce by unlawful, wrongful, or other than normal methods of industrial development, thereby excluding others from participation in that part of interstate or foreign commerce, re-

[1] The phrase "any part of commerce" was defined by this Court in the *Standard Oil Case* as follows (221 U. S. 1, 61):

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

strains and monopolizes such commerce in violation of the Anti-Trust Law. (*Standard Oil Case*, 221 U. S. 1; *Tobacco Case*, 221 U. S. 106; *Nash* v. *United States*, 229 U. S. 373.)

Especially is this principle applicable where a great railroad system, alone or in combination with another corporation, attempts to obtain control of trade and commerce in a staple commodity produced along and transported over its lines, and among other means to that end gives itself or the corporation with which it is combined, as the case may be, enormous advantages over competitors in the cost of transportation—than which, to repeat again the statement of this Court in the *Swift Case*, "no more powerful instrument of monopoly could be used." (196 U. S. 375, 402.)

A railroad is an avenue of commerce, and the business of shipping coal or any other article of commerce over a railroad to markets reached by it and of selling the articles in those markets constitutes a branch of commerce—a "part of commerce"—in which traders are entitled to engage free from restraint by others in the same field—above all, free from restraint by the railroad itself.

It is such a branch of commerce which the petition in the present case charges has been restrained and monopolized, that is, the business of shipping anthracite coal over the lines of the Lehigh Railroad and of selling it in the markets reached via those lines.

A, B, C, etc., are entitled to engage, without restraint, in the business of mining coal from lands along the Lehigh Railroad and of shipping that coal to markets reached by the Lehigh Railroad, and of selling it in those markets.

When Lehigh Railroad itself in effect goes into that same business in combination with a subsidiary corporation, in whose favor it wrongfully exerts its power as a common carrier in the manner above set forth, with the result that that corporation comes into virtually complete control of the business in question, it has excluded others from the business and thereby created an unlawful monopoly.

If Lehigh Railroad may thus monopolize trade and commerce in anthracite coal transported over its lines it may likewise monopolize trade and commerce in every other article transported over its lines. And what Lehigh Railroad may do, every other railroad may do. Private shippers would exist by sufferance only.

Just such a monopolization by another great railroad system of trade and commerce in coal produced along its lines was described and condemned by this Court in the *New Haven Case*, 200 U. S. 361, as follows (pp. 392–393):

> Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules.

That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and *leading to a monopolization* in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, *to create an absolute monopoly.*

* * * * *

And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately and not merely remotely to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake and Ohio, as a result of its being a dealer, had become, long prior to the adoption of the Interstate Commerce Law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, *virtually the sole purchaser and seller of all the coal produced along the line of its road.* That this result was not

> merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *The Attorney General* v. *The Great Northern Railway Company*, 29 Law Journal (N. S. Equity), 794. [Italics ours.]

The Court then quoted at length from the case of *The Attorney General* v. *Great Northern Railway Company*, 29 Law Journal, N. S. Eq., 794, the leading case on the subject at common law, where a similar monopoly was expressly held unlawful. In that case the Great Northern Railway, which transported coal from the north of England to London and intermediate points, and the owners and operators of mines along its route, entered into contracts in which the coal owners disposed of their output to the Railroad Company, whose agents sold it and turned over to the coal owners a certain percentage of the proceeds. The Attorney General asked an injunction to restrain the carrying out of the contracts on the ground that the conduct of the company was not merely technically *ultra vires* but also prejudicial to the public interests as tending to monopoly, thus giving the Attorney General as representative of the public a right to complain. Vice Chancellor Kindersley fully sustained these contentions. That part of his judgment dealing with monopolizing might well have been delivered in the present case. He said (p. 799):

> Here we find this company, having the traffic from the north of England, where the

great coal fields are (at least some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic, that is, the dealing in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the eight years from 1852 to 1857, inclusive [*sic*], the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits shew, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country

> from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, *great detriment to the interests of the public*, for this reason, taking merely the article of coal. [Italics ours.]

Practically the same underlying question was presented very recently in *United States* v. *D. L. & W. R. Co.*, 238 U. S. 516. In that case the Lackawanna Railroad, itself a large producer and purchaser of anthracite along its lines, entered into a contract with the Lackawanna Coal Company, a large purchaser and seller of anthracite, binding the latter not to purchase coal from any producer other than the Lackawanna Railroad itself, thus eliminating the coal company as a competitor of the railroad and tending to give the railroad a monopoly of the production and purchase of coal along its lines. This Court, holding the contract in violation of the Anti-Trust Act, said (p. 533):

> In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee.
>
> * * * * *
>
> By this contract it excluded from that market the Coal Company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. *But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix*

> *the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or to whom it sold—such a contract would undoubtedly have that tendency.* [Italics ours.]

Again, in *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295, 315–318, the Circuit Judges of the Sixth Circuit recently held it to be a violation of the Anti-Trust Act for the Lake Shore & Michigan Southern Railway Company and the Chesapeake & Ohio Railway Company to acquire and mine through subsidiary coal companies 100,000 acres of bituminous coal lands tributary to their lines.

The case of *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. 610, C. C. A., 6th, is also in point. In that case Judge (now Mr. Justice) Day, with whom Judge (later Mr. Justice) Lurton and Judge Severens concurred, held illegal a combination by which a single corporation purchased the entire product of some 14 producers of coal and coke in a certain district along the line of the Chesapeake & Ohio Railway, and sold it at not less than minimum prices fixed by a committee of the producers; saying (p. 623):

> The parties may well be concluded to have intended, in what they did, to put an end to competition in the district in shipments to the Western market to be reached by the Chesapeake & Ohio Railroad, by getting all the operators into an agreement to sell for a single price, to be fixed by a committee of their number, and to limit competition

among themselves in markets near and remote, within the scope of the agreement.

* * * * *

If the scheme of this combination shall prevail, until nearly all of the operators in this district have availed themselves of the opportunity contained in the contract and become parties to it, the effect upon dealers who have not its large facilities, and may be unable to compete for the contracts and meet the prices fixed by the committee, cannot be otherwise than disastrous. And when the small dealer has been driven out, the combination is one step nearer to the power to control the market.

A combination among coke producers in the Pocahontas Flat Top Coal Field along the lines of the Norfolk & Western Railroad, similar to the combination condemned in the *Chesapeake & Ohio Fuel Case* just referred to, was held to be illegal at common law in the case of *Pocahontas Coke Co.* v. *C. & C. Co.*, 60 W. Va. 508, 519.

In still another aspect commerce is unlawfully restrained by the control acquired by Lehigh Railroad in combination with Lehigh Coal Company over anthracite coal produced from mines along its lines; i. e., such control excludes other carriers from the privilege of competing for the transportation of the tonnage from mines on the Lehigh Railroad.

Can a great railroad system by purchase, executory contract, or otherwise, tie to itself permanently

all traffic which may move over its lines, thereby excluding the competition of other carriers?

Every railroad "is, if not a legal, largely a practical, monopoly," as regards the majority of the persons along its line, and an arrangement which "broadens and extends such monopoly" cannot be looked upon "as other than an unreasonable combination in restraint of interstate commerce." (*Northern Securities Case*, 193 U. S. 197, 363, per Brewer, J., quoted with approval in *Union Pacific Case*, 226 U. S. 61, 83.)

Where a given colliery is reached by two railways its tonnage, when destined to any market reached via both, in the absence of some artificial obstruction, will move over the one which furnishes the best service and charges the lowest rates. (Coyle, 3 R. 2030–1; Shea, 3 R. 1438.) Such competition is highly beneficial. (Coyle, 3 R. 2031; Kahn, 1 R. 574–575.) But if one of the railroads reaching that mine should buy the stock of the mining company, and thus be able to direct the shipment of the output over its own line, competition would be at an end.

And even where a mine is reached by only one railroad, if its output is free there is always the possibility that other railroads will connect with it; i. e., the potentiality of competition is always present.

To shut out such competition, whether actual or potential, and create a monopoly in the transportation of anthracite coal from mines reached by its lines was admittedly, as we have seen, one of the objects of Lehigh Railroad in securing control of coal lands and stocks. (*Supra*, pp. 26–27.)

In *United States* v. *Reading Company*, 226 U. S. 324, 346–355, this Court held that just such an acquisition by railway companies of coal mines for the purpose of suppressing competition for the transportation of the output thereof constitutes a violation of the Anti-Trust Act.

If the law were otherwise, if the object admitted by Lehigh Railroad were regarded as legitimate, then every railroad would be free to monopolize all the produce on its line.

Normal cases of integration of industry, such as *United States* v. *Winslow*, 227 U. S. 202, are not in point. We are dealing here with the inconsistent functions of public carrier and private shipper (*The Lackawanna Cases*, 231 U. S. 363; 238 U. S. 516). An industry is not integrated by combining inconsistent functions.

It is said that it is "not practicable" for any other railroad to build connections to the collieries controlled by Lehigh Railroad even if they were in independent hands and thus open to competition. (L. V. R. R. Ex. 54, 4 R. 2305.) This defense does not lie in the mouth of Lehigh Railroad, which bought the properties for the avowed purpose, as shown above (pp. 26–27), of monopolizing for itself the transportation of the tonnage therefrom and of preventing any other railroad company from acquiring it by competition. In overruling a similar contention on the part of the defendants in the *Reading Case*—that the competition which they had sought to prevent by purchasing control of the Simpson &

Watkins collieries would not have materialized or have been successful—this Court said (226 U. S. 324, 351):

> They were so far convinced of the threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

Moreover, if it is "not practicable" for any other railroad to build connections to the collieries on the Lehigh Railroad, what becomes of the attempt to justify Lehigh Railroad's monopolization of the coal trade along its lines on the ground that it was necessary to do so in order to prevent other railroads from securing the tonnage? The two defenses destroy each other.[1]

[1] The contention that it would not have been practicable for other railroads to connect with the collieries whose output is tied to Lehigh Railroad by stock ownership or otherwise, is shown by the record to be unwarranted by the facts. Eleven of the independent collieries connected with Lehigh Railroad tracks are connected also with one or more competing railroads, notwithstanding the fact that their tonnage, and therefore the inducement to compete for it, is comparatively small. (L. V. R. R. Ex. 54, 4 R. 2305.) But not one of the collieries controlled by the railroad by stock ownership or tied to it by routing clauses is connected with any competing railroad. It is unthinkable that if the great collieries of Lehigh Coal Company were in independent hands their tonnage would not be competed for by other railroads; and the only witnesses who testified in support of the theory that connections with other railroads would not have been "practicable," even if the collieries had been in independent hands, were three employees of Lehigh Railroad, no one of whom is a civil engineer, and who based their testimony on reports of engineers in the company's employ who were not produced as witnesses. (Ross, 3 R. 1411; Gildroy, 3 R. 1421-1422; Shea, 3 R. 1441.) The worthlessness of their estimates is illustrated by the fact that an estimated expenditure of $16,200 for a possible connection with the Blackwood colliery is treated as prohibitive (L. V. R. R. Ex. 54, 4 R. 2305), whereas the Lehigh Railroad itself built a line five miles or more in length in a mountainous country for the purpose of reaching the same colliery. (Ross, 3 R. 1412.)

It is also said that the purchase of coal stocks by one railroad company for the purpose of tying the tonnage to itself and thus preventing competition therefor by other carriers—unlike the purchase of coal stocks by several railroad companies in combination, such as the purchase by the various anthracite carriers of the control of the collieries of Simpson and Watkins for the purpose of preventing competition by the projected New York, Wyoming & Western Railroad for the transportation of their output (226 U. S. 324, 346–355)—is merely a case of successful competition. Several railways are in competition for the tonnage, and one, it is said, outstrips its rivals and secures the tonnage forever by purchasing the control of the collieries from which it issues. The answer is, however, that while the tonnage is secured by one of the competitors, it is not secured *by competition*. The case is as if one of the competitors for a prize should *buy* the prize.

IV.

DECISION OF THE DISTRICT COURT CONSIDERED—THE DEFENSE THAT THE COMBINATION IS NOT *NOW* ENGAGED IN *INTERSTATE* COMMERCE.

As before stated, the coal mined and purchased by Lehigh Coal Company and Coxe Bros. & Company is now marketed by Lehigh Coal Sales Company under a contract dated March 1, 1912, purporting to pass title to the coal f. o. b. railroad cars at the mouth of the mines.

Judge Hough's decision that Lehigh Railroad is not restraining or monopolizing *interstate* trade in anthracite coal produced along and transported over its lines is based solely upon that circumstance. That is, he first finds that by virtue thereof Lehigh Railroad becomes dissociated before transportation from the coal mined and purchased by Lehigh Coal Company, its instrumentality, thereby complying with the Commodity Clause; and from that he concludes that it is not engaged in *interstate* trade in coal and therefore is not restraining or monopolizing it. Thus he says:

> The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce, for such relations begin, exist, and end within the limits of the State of Pennsylvania and are there entirely legal. (5 R. 232.)

Again—

> If the Lackawanna Case is to be followed and any violation (at or since time when bill filed) of the Commodities Clause denied, there is no life left in this action unless the meaning of the well-worn phrase "interstate commerce" is to receive fresh enlargement. (5 R. 232.)

Finally he says:

> As to restraint of interstate trade in coal transported over the Lehigh Road, there can be no restraint without control, and since the

> railroad does not control the coal it carries it has no means of restraint. (5 R. 233.)

There are two answers to this contention.

First. As we shall later show (*infra*, pp. 127–141), the arrangements with Lehigh Coal Sales Company do not have the effect of dissociating Lehigh Railroad from coal mined and purchased by Lehigh Coal Company and Coxe Bros. & Company, as required by the Commodity Clause. Judge Hough's decision to the contrary was based solely on a case decided by the Circuit Judges of the Third Circuit, *since reversed by this Court*, namely, the *Lackawanna Case*, 213 Fed. 240, and 238 U. S. 516, the differences between which and the present case Judge Hough rightly held to be "wholly unsubstantial." (5 R. 228.)

Second. Interstate commerce would none the less be affected, however, and the monopoly in question none the less in force, even if Lehigh Railroad had dissociated itself at the mouth of the mines from the coal produced and purchased by Lehigh Coal Company by transferring the title to Lehigh Coal Sales Company.

"Commerce among the several States," said Mr. Justice Holmes in *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512, "is a practical conception not drawn from the 'witty diversities' of the law of sales." In a later case, *Dozier* v. *Alabama*, 218 U. S. 124, he added (p. 128):

> What is commerce among the States is a question depending upon broader considera-

> tions than the existence of a technically binding contract, *or the time and place where the title passed.* [Italics ours.]

Persons may restrain interstate commerce though themselves not engaged therein. For example, in *Loewe* v. *Lawlor*, 208 U. S. 274, the defendants were members of a labor union who were prosecuting a boycott against a manufacturer of hats in Connecticut; they were not engaged in interstate commerce; their acts were not transactions of interstate commerce; it was enough that interstate commerce was affected by what they did—that the sale of plaintiff's hats in other States was obstructed. Similarly, in *United States* v. *Reading Co.*, 226 U. S. 324, 367, it was held that the 65 per cent contracts directly affected interstate commerce though entered into in Pennsylvania by corporations of that State and performable there. See also *United States* v. *Coombs*, 12 Pet. 72; *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375, 398–399; *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Gibbs* v. *McNeeley*, 118 Fed. 120.

To concede that Congress may prescribe a rule for interstate commerce and yet deny it the power to enforce that rule by prohibiting acts directly interfering with it when they take place within State lines, would be, in the language of Mr. Chief Justice White, "but to concede the power and then deny it, or at all events to recognize the power and yet to render it incomplete." (*Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, 495.)

It follows that in determining whether a restraint or monopolization of interstate commerce still exists, a mere transfer of title to the monopolized article within the State where produced, leaving conditions substantially as they were before, is of no consequence.

Applying this principle here, the monopolistic condition created by Lehigh Railroad in combination with Lehigh Coal Company remains wholly unchanged in substance. Assuming the legality of the contract of March 1, 1912, all that it accomplished was a mere transfer of title to the coal mined and purchased by Lehigh Coal Company and Coxe Bros. & Company to Lehigh Coal Sales Company, which is not even an independent corporation, but on the contrary was organized at the instance of Lehigh Railroad and has always had the same controlling stockholders. A monoply is not dissolved by handing it over *en bloc* to another corporation.

If a monopoly unlawful in its creation could be made secure in this manner the law would indeed be impotent.

Would the Standard Oil and Tobacco Combinations have met the requirements of the law by merely transferring the title to their products to a separate corporation at the point of manufacture? The International Harvester Company does just that; but it did not claim on that account, either in the District Court or in this Court, to have placed

itself beyond the reach of the Act of Congress. The question is the same here.

Moreover, the contract of March 1, 1912, directly relates to interstate commerce, and requires that Lehigh Coal Sales Company shall conduct an interstate business.[1]

Again, the contract of March 1, 1912, between Lehigh Coal Company and Lehigh Coal Sales Company, is in and of itself a contract in restraint of trade, because of the provisions for exclusive dealing prohibiting Lehigh Coal Company from selling to any other buyer and prohibiting Lehigh Coal Sales Company from buying from any other seller. It was so held by this Court in reference to the precisely similar contract between the D. L. & W. Railroad Company and the D. L. & W. Coal Company in *United States* v. *D. L. & W. R. Co.*, 238 U. S. 516. The contract of March 1, 1912, being thus illegal and void, it was ineffectual even to transfer title to the monopoly, much less to dissolve it.

Finally, the fact that the controlling stockholders of Lehigh Coal Sales Company are the same persons as the controlling stockholders of Lehigh Railroad (even though standing alone it might not

[1] The contract requires Lehigh Coal Sales Company to take over the agency and sales contracts of Lehigh Coal Company with various persons and corporations in States other than Pennsylvania (Gov't Ex. 3, 5 R. 55, 58, 66) and also to lease storage plants and other facilities in States other than Pennsylvania (5 R. 55, 56-57). Moreover, it obliges Lehigh Coal Sales Company to use its best efforts to widen the markets for the coal (Gov't Ex. 3, 5 R. 55, 59), and, therefore, as the Lehigh Coal Company was already engaged in interstate commerce, it necessarily requires that the Lehigh Coal Sales Company shall continue in such commerce.

bring the transportation by Lehigh Railroad of a commodity belonging to Lehigh Coal Sales Company within the prohibition of the Commodity Clause) in itself negatives any dissolution of the monopoly. That principle was settled by the *Union Pacific Case*, 226 U. S. 470, where this Court refused to sanction a plan for the dissolution of a monopoly which would have left the several parts in the hands of corporations having the same controlling stockholders. It was there said (226 U.S. 475–476):

> Bearing in mind the object of the statute to end such combinations and the duty of the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute.

V.

OTHER DEFENSES CONSIDERED.

1. THE CONTENTION THAT THIS IS AN ATTEMPT "TO WORK OUT UNDER THE ANTI-TRUST LAW RESULTS WHICH THE COMMODITY CLAUSE OF THE HEPBURN ACT IS OBVIOUSLY ENACTED TO ACCOMPLISH."

It was suggested in one of the briefs below that in this proceeding the Government is attempting "to work out under the Anti-Trust Law results which the Commodities Clause of the Hepburn Act was obviously enacted to accomplish." (Br. L. V. Coal Sales Co., p. 6.)

This is a wholly mistaken view of the case. There might be foundation for the suggestion if the Government were contending in this proceeding that the mere acquisition and holding by Lehigh Railroad *of any* interest in the production and sale of anthracite coal transported over its lines is a violation of the Anti-Trust Law.

The petition makes no such charge, however. So far as the Anti-Trust Law is concerned, the charge is not that Lehigh Railroad has merely acquired *an* interest in the production and sale of anthracite coal transported over its lines, but that by acquisitions coupled with methods wrongful and unlawful in themselves, it has *monopolized* the production and sale of anthracite coal transported over its lines—the theory being that such a monopolization has always been unlawful at common law and under the Anti-Trust Law, regardless of the Commodity Clause; and the remedy provided by the Anti-Trust Law for breaking up such a monopoly being more effective than that provided by the Commodity Clause, it was not only the right but the duty of the Government to pursue the more effective remedy.

Of course, we do not maintain that the Anti-Trust Law already covered the same ground as was subsequently covered by the Commodity Clause. We may concede for the purposes of this case that the Anti-trust Law did not prohibit a railroad from acquiring any interest whatever in articles of commerce trans-

ported over its line. To prohibit that the Commodity Clause was enacted. We do maintain, however, that, without reference to the Commodity Clause, *monopolization* by a railroad of an industry along its line was always prohibited—that is, by the Anti-trust Law and before that by the common law.

The theory on which violations of the Commodity Clause were included in the petition is that—

> Such unlawful combining of the function of dealer with the function of carrier by defendant Lehigh Railroad has given it an undue advantage over independent producers and shippers of anthracite and has been one of the principal means by which it has acquired its hereinabove described monopoly of production, transportation, and sale of anthracite from mines along its lines, and has afforded it a cover for giving rebates and undue preferences to Lehigh Coal Co., which it has done as hereinabove alleged in violation of section 3 of the Act to Regulate Commerce (24 Stat. 379), and in furtherance of its aforesaid monopoly. (Pet., 5 R. 41.)

2. THE CONTENTION THAT LEHIGH RAILROAD'S CONTROL OF THE TRADE AND COMMERCE IN ANTHRACITE COAL PRODUCED ALONG AND TRANSPORTED OVER ITS LINES WAS ACQUIRED AND IS HELD UNDER THE SANCTION OF THE LAW AND POLICY OF PENNSYLVANIA.

The answers to this contention are—

1. Even if true (which we deny), it is irrelevant. If a transaction violates constitutional enactments of Congress such as the Anti-Trust Act has been held to be, it is immaterial whether or not the transaction

has the sanction of State law. In the *Northern Securities Case*, it was held (193 U. S. 197, 346):

> It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress.

And again, in the *Union Pacific Case* (226 U. S. 61, 86):

> That the purchase was legal in the State where made and within corporate powers conferred by state authority constitutes no defense, if it contravenes the provisions of the Anti-Trust Act, enacted by Congress in the exercise of supreme authority over interstate commerce.

Nor would it make any difference if the combination denounced as illegal by the Anti-Trust Act had existed *prior* to the passage of that act under the authority of valid State laws. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 342; *Standard Oil Company* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 164 Fed., 700, 722; 221 U. S. 106, 176; *Boyd* v. *N. Y. & H. R. Co.*, 220 Fed. 174, 180.) In the present case, however, the monopolization had only made a beginning in 1890 when the Anti-Trust Act was passed; it is almost wholly of subsequent growth. See table *supra*, p. 12.

2. However, the law of Pennsylvania, even as construed by defendants, has never done more than permit a railroad company to acquire *an* interest in

the stocks of coal mining companies and in some instances *an* interest in coal mines. The law of Pennsylvania, construe it as broadly as we may, has never authorized a railroad company to *monopolize* the business of shipping coal or any other commodity over its line, as Lehigh Railroad has done. It has never authorized a railroad company by all manner of rebates and preferences to build up the business of one mining company, in which it had an interest, at the expense of all others shipping over its road, as Lehigh Railroad has done.

No mere general grant can ever give authority to establish a monopoly. For example, general laws in many States authorize consolidations of corporations, but such laws do not justify carrying the process of consolidation to the point of uniting all the units in a particular branch of trade and of excluding outsiders from the field. As said by the Circuit Court of Appeals, Sixth Circuit, in *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 72:

> The statutes did give this power of purchase or consolidation; but such general powers must be construed as subordinate, not paramount, to specific prohibitions of monopolistic combination.

The common law prevails in Pennsylvania, and the common law principle prohibiting monopolization and restraint of trade—like the Federal Anti-Trust Law—is "a limitation of rights, rights which may be pushed to evil consequences and therefore

restrained." (*Standard Sanitary Co.* v. *United States*, 226 U. S. 20, 49.)[1]

3. But the law and policy of Pennsylvania are and have always been quite different from what defendants would have us believe.

The policy of the State since January 1, 1874, is shown by section 5 of Article XVII of the State Constitution effective January 1, 1874, which reads as follows:

> No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length. (2 R. 1102.)

Whatever may be the construction of this provision, Judge Buffington has well expressed its *minimum effect* as follows:

> Certain it is it strips every purchase in Pennsylvania since 1874 of mining properties

[1] So, the Pennsylvania Act of 1869 authorizing railroad companies to hold stock in other railroad companies does not authorize a railroad company to hold a controlling interest in the stock of a company owning a parallel or competing line in violation of a prohibition contained in the subsequently enacted Constitution of 1874. (*Pennsylvania R. R.* v. *The Commonwealth*, 7 Atl. Rep. 368, 374.)

by common carriers of the status of innocent purchases. (*First Commodity Clause Case*, 164 Fed. 215, 253.)

The contention that this section is inapplicable to companies previously chartered by special act is not supported by the authorities. A section of the Constitution of 1874 *in pari materia*, prohibiting railroad companies from consolidating with, leasing or in anywise controlling competing lines, has been applied by the Supreme Court of Pennsylvania to the Pennsylvania Railroad Company, which was chartered by special act long prior to 1874. (*Pennsylvania R. R. Co.* v. *The Commonwealth*, 7 Atl. 368.)

So, section 8 of Article XVI of the same Constitution, restricting the power of eminent domain, has been held applicable to the Pennsylvania Railroad Company and to the Philadelphia & Reading Railroad Company, each of which had been previously incorporated by special act. (*Penna. R. R. Co.* v. *Duncan*, 111 Pa. St. 352; *Phila. & Reading R. R. Co.* v. *Patent*, 17 W. N. C., Pa., 198.)

Even prior to the Constitution of 1874, however, the laws of Pennsylvania had never favored any general union of the functions of mining and transportation—still less any monopoly built up by means of such a union. The first general law of Pennsylvania fixing the powers of railroad companies (Act of 1849, No. 76, p. 79) expressly *forbade* any railroad company subject to its provisions to engage in any other business than the operation of a railroad or

to hold any land not needed for transportation purposes.[1]

Expressly subject to this restriction no less than *two hundred and forty one* railroad companies, the roads of many, perhaps most, of which extended into either the anthracite or the bituminous coal fields, were chartered by special acts of incorporation prior to the abolition of special charters by the Constitution of 1874.[2] In addition, all railroad companies formed under the general act for the formation of railroad companies (Laws of 1868, p. 62) were subject to this prohibition; and *ninety-eight* additional railroad companies were chartered by special acts of incorporation containing prohibitions at least as stringent as those above quoted from the Act of 1849;[3] while thirty-seven other charters of railroad companies conferred no mining powers, although not expressly prohibiting them.[4]

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[1] The restriction was in the following terms:

"*Provided*, That nothing herein contained shall be construed as in any way giving, to such corporation, any banking privileges whatever, or any other liberties, privileges, or franchises but such as may be necessary or convenient to the procuring, owning, making, maintaining, regulating, and using their railroad, the locomotives, machinery, cars, and other appendages thereof, and the conveyance of passengers, the transportation of goods, merchandise, and other commodities thereon: *And provided further*, That such company shall not purchase or hold any real estate, except such as may be necessary or convenient for the making and constructing of their railroad, or for the furnishing of materials therefor, and for the accommodation of depots, offices, warehouses, machine shops, tool houses, engine and water stations, and other appropriate appurtenances, and for the persons and things employed, or used in and about the same." Pa. Laws of 1849, No. 76, §2, p. 80.

[2] See list of such charters, Appendix E, *infra*, p. 152.

[3] See list of such charters, Appendix F, *infra*, p. 160.

[4] See list of such charters, Appendix G, *infra*, p. 165.

The laws of Pennsylvania did, indeed, permit owners of mining lands to condemn land for short lateral roads or tap lines not over three miles in length in order to reach the great arteries of transportation—namely, canals or trunk line railroads.[1] Mining *companies* might perhaps avail of these lateral railroad acts; but the general laws incorporating mining companies never conferred any railroad privileges,[2] and at least ninety-three mining companies were chartered by special act without power to operate railroads of any kind.[3] Frequently, however, in pursuance of the same general policy underlying the lateral railroad acts, the legislature conferred upon mining companies by special acts of incorporation power to construct railroads in the nature of tap lines.[4] In forty-one such cases no power of condemning private property was conferred, so that the construction of a railroad of

[1] See Laws of 1831–2, No. 189, p. 501; Laws of 1842, No. 14, p. 18; Laws of 1848, No. 363, p. 516.

[2] Laws of 1835–6, No. 194, p. 799; Laws of 1853, No. 356, p. 637; Laws of 1854, No. 184, p. 215; Laws of 1854, No. 434, p. 437; Laws of 1856, No. 299, p. 283; Laws of 1864, No. 949, p. 1102; Laws of 1873, No. 4, p. 28. For a review of the lateral railroad laws of Pennsylvania, see *Woddell's Appeal*, 84 Pa. St. 90.

[3] See List of such charters set forth in Appendix H, *infra*, p. 167.

[4] The words "railroad and coal company" in the corporate names of many Pennsylvania corporations by no means always indicate any dual power of engaging in the business of mining and of common carriers. For example, "The Lykens Valley Railroad & Coal Company," chartered under that name by Pennsylvania Laws of 1829–30, No. 190, p. 369, was expressly prohibited by that act from engaging in mining or trading or holding coal lands for the purpose of carrying on the coal trade.

Moreover, the common expression used in Pennsylvania charters to define the powers of mining companies—"mining, transporting to market and selling coal"—does not imply any power to act as common carrier, but merely authorizes the company to transport or provide for the transportation, by common carriers or otherwise, of its own coal.

any considerable length was impossible.[1] In eighty other cases the maximum authorized length of the roads was less, generally very much less, than the fifty miles which were subsequently permitted by the above-quoted provision in the Constitution of 1874 and which may therefore be taken as roughly marking the limit of a mine tap line.[2] In at least eighty-five of the remaining cases, although no maximum mileage is fixed, the roads authorized are shown to be mere lateral roads by the fact that the designated termini are the company's mines on the one end and some railroad or railroads in the vicinity on the other.[3] Undoubtedly, in the vast majority of the remaining thirty-four cases in which companies empowered to engage in mining were also empowered to operate some kind of railroad, the railroads authorized were very short and really in the nature of lateral roads.[4]

Only ten cases have been found in which companies chartered by the State of Pennsylvania with power to engage in mining as well as to operate railroads of any description have filed reports with the Interstate Commerce Commission as owning railroads engaged in interstate commerce.[5]

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[1] For list see Appendix I, *infra*, p. 170.

[2] See list set forth, Appendix J, *infra*, p. 172.

[3] As to the significance of such a description of the termini, see *Warren & Franklin R. R. Co.* v. *Clarion Land & Imp. Co.*, 54 Pa. St. 28. For list of companies, see Appendix K, *infra*, p. 175.

[4] See list, Appendix L, *infra*, p. 178.

[5] Delaware & Hudson Co.; Delaware, Lackawanna & Western R. R. Co.; East Broad Top R. R. & Coal Co. (30 miles); Fall Brook Coal Co. (7.2 miles); Huntingdon & Broad Top Mt. R. R. & Coal Co. (64.2 miles); Jamestown & Franklin R. R. Co. (50.91 miles); Lehigh & Susquehanna R. R. (Lehigh Coal & Nav. Co.); Little Saw Mill Run R. R. Co. (3 miles); Northern Coal & Iron Co. (21.98 miles); Shamokin Valley & Pottsville R. R. Co. (29.78 miles).

4. In many if not all of its acquisitions of coal properties Lehigh Railroad clearly acted wholly without charter power. Its charter expressly prohibited it from engaging in any other business than that of transportation. (Pa. Laws 1848, No. 422, p. 575, §2.) Two of the corporations merged into it under color of general laws authorizing the consolidation of "railroad companies," namely, the Beaver Meadow Railroad and Coal Co. and the Hazleton Coal (or Railroad) Co., had power to hold coal lands to a limited extent, i. e., 2,000 acres and 3,000 acres, respectively.[1] The limited power of these two constituent companies to hold coal lands was already nearly exhausted at the time of the consolidations (Baird 3 R. 1127), and Lehigh Railroad by the mergers acquired no power to engage in mining contrary to its own charter.[2] Therefore, the answer of Lehigh Railroad in *United States* v. *Reading Company*, 226 U. S. 324, expressly admitted that (Rec., Oct. Term 1911, Nos. 198, 206, 217, Vol. I, p. 63):

> * * * it has not the power under its charter to mine coal or to buy, sell, or otherwise deal therein for profit.

Neither the charter of Lehigh Railroad nor that of any of the corporations consolidated with it, nor any

[1] As to the Beaver Meadow R. R. & Coal Co., see Pa. Laws of 1829-30, No. 194, p. 392; Pa. Laws of 1832-3, No. 13, p. 18; Pa. Laws of 1836-7, No. 6, p. 5; Pa. Laws of 1849, No. 154, p. 185. As to Hazleton Coal Co., see Pa. Laws of 1835-6, No. 47, p. 129; Pa. Laws of 1856, No. 3, p. 2.

[2] By the statute under which the consolidations took place, the charter of Lehigh Railroad as the corporation *into* which the mergers were made was to prevail over the charters of the other companies in case of any inconsistency. Pa. Laws of 1861, No. 657, p. 702.

amendment, has ever authorized the holding of stocks in coal companies. The only color of authority for that is the General Act of 1869 (Pa. Laws, 1869, No. 33, p. 31), empowering "railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this commonwealth, by purchase of their capital stock or bonds, or either of them."[1] This grant, in so far as it remained unexecuted, was repealed by the later and inconsistent provisions of the Pennsylvania Constitution of 1874.[2] The authority

[1] The defendants also refer to the Act of 1868, Pa. Laws, 1850 (L. V. R. R. Ex. 22, 4 R. 2170), authorizing any Pennsylvania corporation to invest its surplus or earnings "in mortgages on improved real estate, in ground rents in the loans of the United States, in the purchase from the holders thereof any of the shares of the capital stock of the respective company, and also in the public debt of the State of Pennsylvania, or of the city of Philadelphia, or in other good stocks or securities." But clearly, the words "other good stocks or securities" must be confined by the *ejusdem generis* rule of construction to securities of the same general class as the public debt of the State of Pennsylvania or of the city of Philadelphia, and can not be extended to highly speculative stocks, such as mining stocks. Also, the modal provisions of this Act requiring the assent of the stockholders to each investment, etc., have never been observed by Lehigh Railroad in its purchases of coal stocks.

[2] Assuming but not conceding that prior to Jan. 1, 1874, the Legislature of Pennsylvania had authorized railroads, either in their own names or indirectly through holding the stock of and controlling coal-mining companies, to engage in mining coal for transportation over their own lines, it was yet within the power of the people of that State, believing the privilege improvidently granted and its continued exercise a menace, to provide in their new constitution, all existing laws and charters to the contrary notwithstanding, that no railroad *not then so engaged in mining coal* should thereafter be permitted to do so, that the authority once granted, whether by general or special law, *in so far as it remained unexecuted*, was then and there repealed.

This principle was decided in *Pearsall* v. *Great Northern R. Co.* (161 U. S. 646) and *Louisville & Nashville R. Co.* v. *Kentucky* (161 U. S. 677). The issue in each of those notable cases was whether an unqualified grant to a railroad to consolidate with or purchase the shares of other roads could be taken away in respect of competitive lines, in so far as it remained unexecuted, the right to amend being reserved in the charter in one case, but

conferred by this act was, moreover, merely to *aid* coal companies and not a power virtually to become a coal company by acquiring its entire stock and operating it as a mere adjunct or department.

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not in the other. (161 U. S. 694, 695.) The Supreme Court held that it could in either case, saying in *Louisville & Nashville R. Co.* v. *Kentucky* (p. 695):

"We regard the issue presented in this case as involving practically the same question. While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the *Pearsall Case*, that under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired."

The principle deducible from these two cases is that where a privilege granted to a corporation has in the progress of events become inimical to the public welfare, the State, exercising its police power, may rescind it so far as unexecuted.

The State would have this power, moreover, irrespective of any reserved right to revoke the privilege of acquiring the shares of coal companies given to Lehigh Railroad by the act of 1869. (*Louisville & Nashville R. Co.* v. *Kentucky*, *supra*, p. 695.) Lehigh Railroad was, however, by express statutory provision subject to the general railroad act of 1849, No. 76 (see Pa. Laws of 1856, No. 116, sec. 3, p. 96), and that act of 1849 contained the following provision:

"The legislature hereby reserves the power to resume, alter or amend any charter granted under this act, and take for public use any road constructed in pursuance of such charter. Provided, that in resuming, altering, or amending said charters, no injustice shall be done to the corporators." (Pa. Laws, 1849, No. 76, pp. 79, 88.)

The Pennsylvania constitution of 1874 may operate as an exercise of such a reserved power of amendment or repeal. (*Chinchclamouche Lumber Co.* v. *Commonwealth*, 100 Pa. St. 438, 445.)

Again, even if it were conceded (which it is not) that the holding by a railroad company of a majority or all of the stock of a mining company and the management thereof as in substance a part of the carrier's own business is not indirectly prosecuting or engaging in mining within section 5 of article 17 of the Pennsylvania Constitution of 1874, nevertheless the holding by a railroad company of stocks in mining companies, not temporarily or as an investment of reserve funds incidental to the business as a common carrier, but as an end in itself, especially when coupled with the lending of money to mining companies, constitutes a "*business*," and as such forbidden by the clause of said section prohibiting railroad companies from engaging "*in any other business than that of common carriers.*"

Again, giving the words of the grant the construction claimed for them by Lehigh Railroad, and assuming also that the Act was not repealed by the Constitution of 1874, it still would not justify much that Lehigh Railroad did under color of it. For a proviso attached to the Act expressly stated that it should "not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill." Yet Lehigh Railroad acquired stock in companies possessing mining privileges in Schuylkill County and therefore not within the operation of the Act.[1] For example, the Locust Mountain Coal & Iron Company, one of the mining companies whose stock was acquired by Lehigh Railroad, was expressly empowered by Act of Assembly to exercise its franchises in Schuylkill County. (Pa. Laws of 1853, No. 184, p. 265.) Similarly, Coxe Bros. & Co., Inc., was formed under the general mining law subject to the Constitution of 1874 and holds and exercises mining privileges in Schuylkill County. (See L. V. C. Co. Ex. 5, 4 R. 2651; and Govt. Ex. 136, 2 R. 1039.)

5. As pointed out above (pp. 24–28, 67), Lehigh Railroad did not acquire or construct its railroads for the purpose of obtaining an outlet to market for the produce of its coal lands, but acquired its coal properties after its railroads in the anthracite regions had been constructed, and for the purpose of grasping the tonnage for itself and preventing any other

[1] The stock of one, but only one, of these companies, the Delano Land Company, was exempted by charter from the proviso of the Act of 1869. (L. V. R. R. Ex. 25, 4 R. 2172.)

railroad from earning it by competition. The contention that this conduct was necessary to the financial prosperity of Lehigh Railroad because other railroad companies were pursuing a like policy needs only to be stated to be answered. The Circuit Court of Appeals, Sixth Circuit, stated a similar argument as follows, quoting from the opinion of the Circuit Court (*United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 74):

> The only way to fight the devil was with fire. The only way to fight the monopoly was to monopolize all unoccupied territory.

The court then answered the argument thus (202 Fed. 75):

> It does no good to destroy one monopoly by creating another. Monopolies all look alike to the law.

3. THE CONTENTION THAT LEHIGH COAL COMPANY AND AFFILIATED CORPORATIONS HAVE NO MONOPOLY OF THE SALE OF COAL AT POINTS REACHED BY LEHIGH RAILROAD, BUT MEET IN COMPETITION AT THOSE POINTS NOT ONLY OTHER PRODUCERS LOCATED ON LEHIGH RAILROAD BUT ALSO OTHER PRODUCERS LOCATED ON OTHER ANTHRACITE RAILROADS WHICH INTERSECT WITH LEHIGH RAILROAD.

The petition does *not* charge that Lehigh Railroad has acquired a monopoly of all anthracite coal sold at each and every point reached by its lines, nor that it has acquired a monopoly of the production of coal from all lands which might by any possibility be reached by its lines. Therefore, the evidence adduced for the purpose of showing that

Lehigh Railroad has no such monopolies is all beside the mark.

As before stated, the theory of the petition is that a railroad is an avenue of commerce, and that the business of forwarding coal to markets reached via its line and of selling the articles in those markets constitutes a branch of commerce, in which traders are entitled to engage free from restraint by others in the same field—above all, free from restraint by the railroad itself; and it is such a branch of commerce which the petition charges is being restrained and monopolized, that is, the business of forwarding anthracite coal over the lines of Lehigh Railroad and of selling it in the markets reached by those lines.

It was precisely that sort of monopoly which this Court denounced in the *New Haven Case*, 200 U. S. 361, and not a monopoly of all the coal sold at all points reached via the Chesapeake & Ohio Railroad, including coal brought to those points by other lines or originating on other lines. As the opinion states, the Chesapeake & Ohio had become "virtually the sole purchaser and seller of all the coal produced *along the line of its road*." (P. 393. Italics ours.) In other words, the monopoly there was a monopoly of the business of shipping bituminous coal over the Chesapeake & Ohio to markets reached via that railroad and of its sale in those markets (pp. 392–393); just as in this case the monopoly attacked is a monopoly of the business of shipping anthracite coal over the Lehigh Railroad to markets on that railroad and of its sale in those markets.

Substantially the same contention—that the engrossing by a railroad of virtually the entire trade in coal transported over its line is not illegal or against the public interests because of competition in the markets of the country with coal shipped over other railroads—was advanced and overruled in the leading case of the *Great Northern Railway*, cited by this Court with approval in the *New Haven Case, supra*. Vice Chancellor Kindersley there said (29 L. J., N. S. Eq. 794, 799):

> Mr. Rolt argued—well, but there is no danger of monopoly, because even if you were to suppose that this company got the entire command of all the coal which comes down that line from the inland districts and the northern part of England, that is not monopoly; there is all the coal that comes from the north-western district, the Lancashire district, and all the coal from the Welsh district, Bristol coal, and so on, and there is no monopoly. But follow that out, and suppose this company has got the command of all the coal on its line, and from that part of the country from which it starts, and suppose that the London & North-Western has got the control of all the Lancashire and north-western coal country, and suppose the Great Western has got the command of all the Welsh and Bristol coal fields. You have got, then, the whole traffic in coal which is to supply the metropolis and the country in the hands of three companies. Are not the interests of the public most deeply concerned in

> preventing that? Is it not obvious that the interests of the public must suffer if that state of things is allowed to arise? And, yet, what this company is doing may just as well be done by each of the other companies I have mentioned; and the result would be, in effect, not a monopoly of one company, but a monopoly of three, or four, or five companies, and *a monopoly most prejudicial.* [Italics ours.]

The situation suggested by Vice Chancellor Kindersley in the passage just quoted, as a *reductio ad absurdum* of the contention that a railway company without prejudice to the public might become virtually the sole dealer in the coal shipped over its line, exists in the present case in actuality. That is, what Lehigh Railroad has done the other railroads entering the anthracite regions have done, and the result is—

> not a monopoly of one company but a monopoly of three or four, or five companies, and a monopoly most prejudicial.

In the former *Reading Case* (226 U. S. 324) this Court described the situation in this regard as follows (pp. 340–341):

> * * * These carriers and their subsidiary coal mining and selling companies produce and sell about 75 per cent of the total annual supply of anthracite coal. Of the remainder, the independent operators mentioned above produce about 20 per cent.
>
> The chief significance of the fact that the six carrier defendants control substantially the only means for the transportation of coal

from the mines to distributing points at tidewater is in the fact that they, collectively, also control nearly three-fourths of the annual supply of anthracite which there finds a market. *The situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices at seaboard.* [Italics ours.]

This temptation to combinations amongst the railroads has often prevailed; at least nine instances, including the two redressed so far as practicable in the *Reading Case*, being proved in this record.[1]

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[1] 1877.—Combination "to make such arrangements with the other mining and transporting companies of Anthracite Coal as will adapt the supply to the demand" by curtailing or suspending shipments if necessary. (Minutes L. V. Coal Co., Jan. 9, 1877, 2 R. 649–650.)

1892.—Leases by Philadelphia & Reading R. R. Co. of Central R. R. of New Jersey and Lehigh Valley R. R. (2 R. 987–991) with accompanying agreement by Lehigh Valley Coal Co. to the Philadelphia & Reading Coal & Iron Co. (1 R. 497). These leases fell in consequence of the injunction granted in *Stockton* v. *Central R. R. Co.*, 50 N. J. Eq. 52, 489, and of the receivership of the Reading. (1 R. 497.)

1896.—Movement to apportion anthracite traffic among the various roads according to what were known as the "presidents' percentages." This movement, mentioned in the former *Reading Case*, 226 U. S. 324, 345–346, was formally approved by a general meeting of the Lehigh Valley R. R. Co. which by resolution urged that no effort be spared to secure—

"Such harmonious avoidance of production beyond the current demand for consumption as will ensure prices in the competitive markets which will yield due compensation to the capital invested by the mining and transporting interests." (2 R. 605.)

The expression "competitive markets" indicates that even at that time, when the Railroad Company produced but 22.56% of the anthracite tonnage over its line as against 61.52% to-day, and controlled by production, purchase and the Markle "Agency" contract but 53.07% as against approximately 80% to-day (*supra*, p. 12), some markets were not "competitive" but had been monopolized.

1899.—Successful combination through Temple Iron Co. to prevent construction of New York, Wyoming & Western Railroad. This was adjudged

Whilst, as stated, the petition does not charge that Lehigh Railroad has acquired a monopoly of the sale of anthracite coal at all points reached by its lines, its control of the business of producing and purchasing coal along its lines necessarily gives it a practical monopoly of the sale of coal at points reached *only* by them.[1]

The producers along a given railroad have, if not a legal, at least a practical monopoly of the markets reached solely by that railroad, for the same reason that, as this Court has often pointed out, the railroad

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illegal and, so far as practicable, redressed in *United States* v. *Reading Co.*, 226 U. S. 324, 346–355.

1900.—Successful combination to acquire output of independents through 65% contracts. Likewise adjudged illegal and dissolved in *United States* v. *Reading Co.*, 226 U. S. 324, 355–371.

1901.—Combination through a committee of Temple Iron Co. to fix anthracite freight rates, which except so far as compulsorily reduced are still in the main in effect (2 R. 837–838; 1 R. 313–315). See also narrative of the transaction in the *Anthracite Rate Case*, 35 I. C. C. 220, 228–230.

1901.—Purchase by other anthracite carriers of large block of Lehigh Valley stock, sold since the decision in the former Anti-Trust Case. (1 R. 496–499.)

Nov. 1906.—Successful attempt to dissuade New York, Ontario & Western Ry. Co. from reducing anthracite rates for the purpose of allowing its coal company sufficient revenue to pay expenses. (2 R. 839–846; 1 R. 320.) See also narrative in *Anthracite Rate Case*, 35 I. C. C. 220, 232, 248.

Oct. 1906–Jan. 1907.—Successful combination to prevent Delaware & Hudson Co. from making a 50-cent reduction in anthracite freight rates to New England points. (2 R. 847–849; 1 R. 318–320.) See also narrative in *Anthracite Rate Case*, 35 I. C. C. 220, 246–247.

[1] Even at cities or towns reached by other roads as well as by the Lehigh Railroad the monopoly in coal shipped over the Lehigh Railroad involves a monopoly in the sale of any coal to dealers and large consumers whose yards or factories are connected with the Lehigh Railroad tracks alone. As a practical matter such persons can get coal over no other railroad. The cost of hauling from yards on other railroads is prohibitive; and even at the comparatively few junction points at which an anthracite switching tariff is in effect virtually no anthracite is switched from other railroads to points on the Lehigh Railroad. (Dousman, 3 R. 1316.)

itself has a practical monopoly of the transportation originating at points reached solely by its line. (*Union Pacific Case*, 226 U. S. 61, 83; *Northern Securities Case*, 193 U. S. 197, 363; *Trans-Missouri Freight Ass'n Case*, 166 U. S. 290, 335; *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 647, 676.) And this is peculiarly true in the present case because of Lehigh Railroad's openly avowed policy of so ordering its anthracite rate structure as to preserve the markets along its line exclusively to shippers located along its line. (Grier, 1 R. 332, 348, 350–351, and *supra*, pp. 64–66.)

4 THE CONTENTION THAT LEHIGH RAILROAD CONTROLS ONLY ABOUT 28 PER CENT OF THE ANTHRACITE ACREAGE NATURALLY TRIBUTARY TO ITS LINES.

Assuming this contention to be true in fact, it is irrelevant, like the contention last discussed, and for the same reasons.

As before stated, Lehigh Railroad is not charged with having monopolized the coal lands in the region penetrated by its lines. It is not charged with having monopolized trade and commerce in all the anthracite coal which by any possibility *might* be transported over its lines. The charge is that it has monopolized trade and commerce in anthracite coal which *is* transported over its lines. (*Supra*, p. 8.)

The measure of such a monopoly is the proportion of the total shipments over the Lehigh Railroad controlled by it or its instrumentalities.

As a matter of fact, however, it was not established that Lehigh Railroad controls only 28 per cent of the anthracite acreage naturally tributary to its lines in any practical sense. The evidence adduced by the defendants to prove the extent of coal lands naturally tributary or conveniently accessible to the Lehigh Railroad consisted of testimony of two witnesses (Humphrey, 3 R. 1646, Cochran, 3 R. 1664–1665, 1668) in support of a map purporting to show "the anthracite acreage naturally and conveniently tributary to L. V. R. R." (L. V. Co. Ex. 6, 4 R. 2652). The area so designated embraces the whole of the Eastern Middle Field and about half of all the anthracite region. The area is bounded by arbitrary straight lines, and the standard used was merely that of "geographical proximity" to the Lehigh Railroad (Cochran, 3 R. 1667, 1669), rather than the cost of making connections with that road, as to which one of the two witnesses admitted himself not qualified to speak (Humphrey, 3 R. 1657), while the other devoted but "two half days" to his investigation in the entire Wyoming Field (Cochran, 3 R. 1666).

Moreover, a large proportion of the area thus designated as "naturally tributary" or "conveniently accessible" to the Lehigh Railroad is controlled by other railroads, so that the tonnage is tied fast to them. The list of the collieries in that area, together with the names of the operators (3 R. 1649–1653), shows that forty-seven are operated either by another railroad company or by some

corporation admitted to be controlled by another railroad company through stock ownership. (1 R. 390–391.)

Of course, the area controlled by other railroads (as long as such control is permitted to continue), even if "*naturally* tributary" to the Lehigh Railroad, is no longer *practically* so. That tonnage from such lands should move over the Lehigh Railroad is no more conceivable than if they were separated from it by a range of Alps.

5. THE CONTENTION THAT DEFENDANTS HAVE BEEN ACTUATED BY NO EVIL INTENT AND THAT THE COMBINATION HAS NOT RESULTED IN ANY INCREASE IN FREIGHT RATES OR IN PRICES.

The law is firmly settled adversely to this contention. While a bad intent may render illegal acts otherwise innocent, a good intent can never afford legal justification for doing that which is prohibited.

> If the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. (*United States* v. *Reading Co.*, 226 U. S. 324, 370.)
>
> It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. (*International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209.)

Specifically, the failure to raise prices, or even a lowering of prices, can not justify a restraint or monopolization of trade. (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 324; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 88; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209; *United States* v. *Patten*, 187 Fed. 664, 672.) As said in the *Trans-Missouri Freight Ass'n Case:*

> In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it. (166 U. S. 324.)

In point of fact, however, the intent of the defendants has *not* been innocent. On the contrary, their intent has been to monopolize trade and commerce in anthracite coal transported over the Lehigh Railroad and to exclude other carriers from the privilege of competing for the transportation of tonnage from mines located on the Lehigh Railroad. (*Supra*, pp. 24–28.)

Furthermore, as the petition charges and has now been authoritatively determined by the Interstate Commerce Commission (*Anthracite Rate Case*, 35 I. C. C. 220), the rates charged by Lehigh Railroad for the transportation of anthracite coal have long been excessive. And what is worse, they were made excessive, as the Commission found, for the express *purpose of excluding independent producers from the trade and giving Lehigh Coal Company a monopoly.* (*Supra*, pp. 41–42.)

Also, prices of coal have been arbitrarily raised. In 1912 an average increase of more than 25 cents per ton took place, the excuse for which was an increase of 5.6 per cent in mine-workers' wages, representing an average increase of 9 cents per ton in the cost of producing coal. (Gov't Ex. 144, 2 R. 1049–1056.) In other words, an increase of 9 cents per ton in cost of production was made the excuse for an average increase of more than 25 cents per ton in the prices exacted from consumers.

Similarly, an increase in the prices charged by Lehigh Coal Company, amounting on an average to more than 50 cents per ton on prepared sizes, took place in 1902. (Gov't Ex. 152, 2 R. 1110.)

These increases in the price of coal were not explainable by an increase in the cost of production. The increase in wages, as shown above, is insufficient to account for more than a small proportion of the increase in price. The other causes tending to increase the cost of production (Gov't Ex. 144, 2 R. 1052–1054; Norris, 3 R. 1478–1547) are counterbalanced by factors tending to a reduction in cost—such as improvements in the methods of mining, the increased use of steam sizes which were formerly rejected as waste, and the like (Gov't Ex. 144, 2 R. 1055–1056; Norris, 3 R. 1547–1562).

6. THE CONTENTION THAT THE EVILS COMPLAINED OF CAN BE REDRESSED BY THE INTERSTATE COMMERCE COMMISSION.

The policy of Congress, however, is not to permit combinations which restrain and monopolize trade, and then to attempt through commissions or otherwise to check their evil consequences. On the contrary, Congress has consistently adhered to the policy of *prohibiting* such combinations.

This defense is really a restatement in another form of the old argument that railroads are exempt from the Anti-Trust Law because they are subject to the Act to Regulate Commerce—an argument long ago overruled. (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 312–326; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *Northern Securities Case*, 193 U. S. 197; *Union Pacific Case*, 226 U. S. 61.)

It is also a reflection of the argument frequently heard in the past that where a condition of restraint of trade or monopoly is found to exist the courts should not attempt to remove the *condition* but should merely put a stop to the further use of the *means* by which the condition was brought about.

It would be a vain remedy, so far as the public is concerned, to leave a monopolist in full possession of his monopoly, merely enjoining the means which he employed—means which have already served their purpose.

The same contention was pressed with vigor in the *Standard Oil Case* and was there answered by this Court, once for all, as follows (221 U. S. 1, 77-78):

> But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In the present case a condition of restraint of trade and of monopoly is the thing primarily attacked. To remove that *condition* is the object of the bill. The *means* employed in bringing about that condition have already served their purpose. Merely to prohibit the further use of the *means*, leaving the *condition* itself undisturbed, would be a useless procedure.

7. THE CONTENTION THAT THE VARIOUS REBATES AND PREFERENCES GIVEN BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY AND LEHIGH COAL SALES COMPANY CAN NOT BE ATTACKED IN THE COURTS UNTIL THEY HAVE BEEN PASSED UPON BY THE INTERSTATE COMMERCE COMMISSION.

It is argued that the Interstate Commerce Commission has primary jurisdiction over the various preferences given by Lehigh Railroad to Lehigh Coal Company and affiliated companies, such as advances without interest or at inadequate interest, leases of storage plants at inadequate rents, preferential credit for freight charges, etc. (*supra*, pp. 42, 50, 52), and that the courts have no jurisdiction to consider them until they have been passed upon by the Commission. The answers, however, are:

First. The Commission *has* passed upon many of the very transactions in question, including all the more important ones, and has held them to be illegal preferences, rebates, and departures from the published rates. (*Supra*, pp. 47–48).

Second. The court is not asked in this case to apply any *remedy* under the Act to Regulate Commerce. The advantages granted to Lehigh Coal Company in the cost of transportation were alleged and proved as one of the wrongful means employed in building up and maintaining the monopoly complained of just as similar advantages in the cost of transportation were shown in the *Standard Oil Case*, 221 U. S. 1, 32–33, 42–43, 76.

Third. It is not essential for the purposes of this proceeding under the Anti-Trust Act that the Court decide specifically that the transactions in question

do constitute violations of the Act to Regulate Commerce. It is enough that it be satisfied they are not normal means of industrial development. (*Swift & Co.* v. *United States*, 196 U. S. 375, 402; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 105; *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. 548, 551, C. C. A. 2nd.[1])

Fourth. Where, as here, the transactions amount to a departure from the carrier's published rates or involve discriminations on their face, no prior administrative ruling by the Interstate Commerce Commission is necessary as a condition precedent to an attack upon them in the courts. (*Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 196, 197; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 255, 260, 261; *American Sugar Refining*

[1] In the *Swift Case*, 196 U. S. 375, this Court said (401-402):

"The acts charged in the tenth section [of the petition, namely, combining to secure less than the regular rates for transportation], apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. • • • We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And *even if the advantage is one which the act of 1887 permits*, which is denied, perhaps inadequately, by the adjective 'unlawful,' still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away." [Italics ours.]

Similarly in the *Pacific & Arctic Case*, 228 U. S. 87, this Court said (105):

"Whether $2.60 per ton (the rate charged to independent lines as against $1.60 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States*, *supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. *It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such.*" [Italics ours.]

Co. v. *D., L. & W. R. Co.*, 207 Fed. 733, 742; *Hocking Valley R. Co.* v. *United States*, 210 Fed. 735, C. C. A., 6th; certiorari denied by this Court, 234 U. S. 757; *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 308; *Vandalia R. Co.* v. *United States*, 226 Fed. 713, C. C. A., 7th; certiorari denied by this Court, 239 U. S. 642; *Central R. Co.*, v. *United States*, 229 Fed. 501, C. C. A., 3rd; certiorari denied by this Court.)

PART II.—THE CASE UNDER THE COMMODITY CLAUSE.[1]

I.

LEHIGH COAL COMPANY AND COXE BROS. & COMPANY, INC., ARE MERE INSTRUMENTALITIES OF LEHIGH RAILROAD: THEREFORE, LEHIGH RAILROAD HAS AN INTEREST IN COAL OWNED BY EITHER OF THEM, AND COAL MINED BY EITHER OF THEM IS MINED UNDER ITS AUTHORITY.

Substantially all of the facts alleged in the amended petition in the former case under the Commodity Clause against Lehigh Railroad (4 R. 2612–2614)—which this Court held would establish, if proved, that Lehigh Coal Company is a mere agency or

[1] The Commodity Clause provides that no railroad shall transport in interstate commerce—

"any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." (34 Stat. 585.)

As this branch of the present case, according to the view of the Government, is identical with the *Lackawanna Case*, 238 U. S. 516, recently decided by this court, we merely state the facts showing the parallel, omitting any extended discussion of the law.

instrumentality of Lehigh Railroad (220 U. S. 257)—*are* proved in the present record, together with other facts then unknown to the Government leading to the same conclusion.

As before stated, *Lehigh Coal Company was originally organized as the "Coal Department" of Lehigh Railroad*, owing its creation to a recommendation of the Railroad's "Committee on Coal Lands" that "immediate steps be taken to organize a coal department," by acquiring the entire capital stock of the Luzerne Coal and Iron Company. (Baird, 1 R. 29–30.) In substantial accordance with this plan, the Railroad acquired the entire capital stock of the Luzerne Coal & Iron Company and caused its merger with the Green Land Company, whose entire stock the Railroad likewise owned, forming thereby Lehigh Coal Company.[1] (Baird, 1 R. 27, 30.)

Lehigh Railroad has always owned the entire capital stock of Lehigh Coal Company (Baird, 1 R. 14, 30), and since 1905 has owned the entire capital stock of Coxe Bros. & Co., Inc. (2 R, 665–71.) Shares are nominally transferred from time to time to directors or persons about to become directors in order to qualify them and keep up the form of a corporation aggregate; but in every such

[1] The corporate name for the consolidated company was evidently selected in order to indicate a permanent connection with the Lehigh Railroad, as the coal lands were originally in the Wyoming Valley, not in the valley of the Lehigh River, in which the original line of the Lehigh Railroad lay and from which it took its name. Even now, a comparatively small part of the Lehigh Coal Company's lands are in the Lehigh Valley. (Gov't Ex. No. 135, 2 R. 1039, and L. V. C. Co. Ex. 6, 4 R. 2652.)

case the certificates, indorsed with a blank transfer, are delivered back to Lehigh Railroad, or, if the stock be subject to one of its mortgages, then to the trustee of the mortgage. (Baird, 1 R. 15–6; 3 R. 1145–7.) For years the stock has been and still is voted at corporate "meetings" by proxies given to the secretary of Lehigh Railroad. (Baird, 3 R. 1147.)

Lehigh Railroad and Lehigh Coal Company have always had the same president, who since 1903 has been the defendant E. B. Thomas. (2 R. 622, 645.) Until 1910, after the amended petition in *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, had been filed (2 R. 699), the officers and directors of Lehigh Coal Company were almost without exception officers and directors of Lehigh Railroad. (2 R. 622–624, 645–647.) *At that time* some of the dual positions were abolished. (2 R. 622–624, 645–647; Wilson, 3 R. 1902.) But even now three of the six directors of Lehigh Coal Company, Messrs. Reid, Stotesbury, and Smith, constituting with the president a majority of the board (Gov't Ex. 35, 2 R. 645, 647), are directors or officers of Lehigh Railroad. (Gov't Ex. 22, 2 R. 622, 623.)

The officers and directors of Coxe Bros. & Company, Inc., since 1905 have been and are substantially the same persons as the officers and directors of Lehigh Coal Company (Gov't Ex. 35, 2 R. 645–647; Gov't Ex. 36, 2 R. 648–649); and four of its five directors, Messrs. Thomas, Smith, Stotesbury, and

Reid, are directors or officers of Lehigh Railroad. (Gov't Ex. 36, 2 R. 648–649; Gov't Ex. 22, 2 R. 622, 623.)

Lehigh Railroad, Lehigh Coal Company, and Coxe Bros. & Company, Inc., all use the same general offices in Philadelphia, in a building owned by Lehigh Railroad. (Baird 1 R. 25–26, 63; Tompkins, 1 R. 195.) Lehigh Coal Company and Lehigh Railroad also use each other's telegraph and telephone wires. (Smith, 3 R. 1283–1284.)

Down to 1909 the annual reports of Lehigh Coal Company were part of the Annual Reports of Lehigh Railroad on pages headed—

> Annual report of the board of directors of the Lehigh Valley Railroad Company to the stockholders. (Baird, 1 R. 17–20.)

In the income accounts and balance sheets of Lehigh Coal Company were merged the accounts of all the other affiliated coal companies, without distinction (Baird, 1 R. 22–23), and the total income of the coal companies was added to the income from operation of the railroad in figuring its total income. (2 R. 944–945.)[1]

For many years the affairs of Lehigh Coal Company received more attention at directors' meetings of Lehigh Railroad than at meetings of its own directors. (Baird, 1 R. 30–38, 42.)

[1] In 1909, after the decision in the first *Commodity Clause Case* (213 U. S. 366), when a show of observing corporate distinctions became desirable, the practice mentioned in the text was abandoned, and thereafter the annual reports of Lehigh Coal Company were published separately, but both reports are mailed together in the same envelope to the stockholders of Lehigh Railroad. (Baird, I R. 24–26; McQuade, I R. 167–168.)

After community of ownership and of management, the most vital test by which to determine whether a railroad and a coal company are being operated in illegal intimacy, lies in the financial relations between them. If the treasury of the railroad is treated as a common fund for carrying on at the same time its own business and that of the coal company as well, then the coal company is clearly but an agency or instrumentality of the railroad.

That is the situation here. The finances of Lehigh Railroad and the coal companies which it controls are inextricably intermingled as has already been fully set forth in stating the favors and preferences granted by it to Lehigh Coal Company (*supra*, pp. 42–55). As stated in the minutes of Lehigh Railroad for June 8, 1897, when recording some contemplated improvements at collieries of the Lehigh Coal Company:

> The relations of the two companies are so close that their finances must be necessarily considered together. (Gov't Ex. 13, 2 R. 606, 607.)

The record in this case proves the allegations in the amended petition, sustained by this Court in *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, that—

> The Coal Company has not paid any dividends upon its stock during the time such stock has been owned by the defendant, i. e., the Lehigh Railroad. (Ans. L. V. R. R. Co., 5 R. 90; Ans. L. V. C. Co., 5 R., 105.)

It has been furnished millions of dollars by the defendant, which it has never refunded, and upon which during many years it paid no interest. (*Supra*, pp. 42–49.)

The defendant has guaranteed bonds of the Coal Company and paid interest on such bonds. (*Supra*, pp. 49–50.)

The earnings of the defendant received for the transportation over its lines of the coal produced by the Coal Company and of the coal controlled by means of the contracts above described—i. e. 65% contracts—compensates the defendant for the failure of the coal company to pay dividends on its stock. (*Supra*, pp. 32–42.)

Thus, in effect, the capital and influence of Lehigh Railroad support Lehigh Coal Company as truly as if the business of the latter were in form, as it is in substance, a part of the business of the former.

Lehigh Railroad not merely, as its Answer admits, "controls and long since has been controlling the election of the directors" (5 R. 84), but it dictates *how those directors shall manage* Lehigh Coal Company and Coxe Bros. & Co., Inc., and does not leave them free to act according to their judgment of the interests of those companies as separate entities.

In mortgaging its stockholdings in the coal companies Lehigh Railroad has expressly bound itself to exert—

> control * * over the coal corporation and its product, rendered possible, it is true, by the ownership of the stock, but which was not the necessary result of a *bona fide* exercise of such

> ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. (220 U. S. 273.)

For example, Lehigh Railroad covenants that it will not by voting or abstaining from voting sanction or permit the creation of any floating indebtedness by Lehigh Coal Company with certain exceptions not now material, and makes other stipulations as to the conduct of that company's affairs. (Sec. 9 of mortgage, 5 R. 176–7.) Again, it is even considered necessary to insert in a mortgage by Lehigh *Railroad* (to which Lehigh Coal Company is not a party) an affirmative provision to permit the Coal Company—and that only under certain conditions—to pledge coal which it may mine. (Sec. 12 of mortgage, 5 R. 178.)

An earlier mortgage by Lehigh Railroad contained similar provisions (4 R. 2179–81) pursuant to which the directors of Lehigh Coal Company obediently pledged its treasury stock to the trustee of Lehigh Railroad's mortgage for the purpose of securing the latter's debt. (2 R. 652–3.)

Lehigh Railroad by its mortgage covering the stock of Coxe Bros. & Company, Inc. (to which of course the latter company is not a party), deprives that company and its directors of corporate autonomy

by stipulating that it shall not sell or incumber its property or incur any indebtedness beyond that arising in the usual and ordinary conduct of its business. (2 R. 668; 5 R. 220.)

Lehigh Railroad also uses its power derived from stock ownership to compel its controlled coal companies to ship their output over the Lehigh Railroad to the exclusion of other means of transportation. Mr. Baird, for many years secretary or assistant secretary both of Lehigh Railroad and Lehigh Coal Company, testified as follows:

> Q. And in order to gather to itself the control over the traffic lying in close proximity to those lines you think the Lehigh Valley Railroad Co. purchased these various coal companies?—Yes, sir.
>
> Q. Which enables them to insure the passing of that coal over its line?—Yes, sir.
>
> Q. How does it enable it to do it?—A. By control; stock ownership.
>
> Q. What do you mean by "control"? Do you mean that the Lehigh Valley Railroad because [of] that stock ownership is able to dictate to these companies what lines their coal shall pass over?—A. Yes, sir. (1 R. 507.)

On acquiring the stock of Coxe Bros. & Co., Inc., Lehigh Railroad appropriated its entire surplus amounting to $2,173,519.45 without the declaration of a dividend or any recorded action whatever by its directors. (Tompkins, 1 R. 179–181, 183; 2 R. 675.) Moreover, the net earnings of Coxe Bros. & Co., Inc., from June 28, 1906, to April 19, 1911,

as they accrued, were paid over to Lehigh Railroad without the declaration of a dividend. (Tompkins, 1 R. 184; McQuade, 1 R. 170–171; Gov't Ex. 28, 2 R. 635.) Since that time monthly dividends have been declared precisely equal to the net earnings of that month, whatever they may have been. (Tompkins, 1 R. 183–184; Gov't Ex. 29, 2 R. 635–636.)

The Coal Freight Agent of Lehigh Railroad, W. T. Grier, although not nominally connected with Lehigh Coal Company, considers its interests as much as those of the Railroad in fixing anthracite freight rates. (Gov't Ex. 84, 2 R. 847; Gov't Ex. 92, 2 R. 854–855.) Discussing a proposed reduction in the freight rates, he writes (2 R. 847):

> I pointed out to Mr. Mullen the serious consequences that would undoubtedly result from such action. Aside from the enormous loss of revenue to the railroads, they seem to have the erroneous impression that this reduction in the rail charges would have no effect upon the selling prices. All independent operators on the different railroads would immediately establish prices based on the lower freight rates and, not only this, it would be difficult to explain to the public the 50 cent reduction in the rate and no change in the delivered prices.

Lehigh Coal Company in conducting its business makes onerous contracts for purchases of coal which can only be sold at a loss, and does this because of the profit to Lehigh Railroad in transporting the coal (*supra*, pp. 32–38); and conversely, as just shown,

Lehigh Railroad in fixing its freight tariffs has an eye to the interests of Lehigh Coal Company.

That Lehigh Coal Company and affiliated coal companies are mere instrumentalities of Lehigh Railroad has been expressly recognized in the latter's corporate records. For example, Lehigh Railroad's "Committee on the Valuation of Coal Lands" in a report to the directors dated July 15, 1903, referred to the coal lands (not the stock) of Lehigh Coal Company and other subsidiary coal companies as "the company's anthracite properties," the company being Lehigh Railroad. (Baird, 1 R. 20–22.) Other similar instances might be given. (Baird, 3 R. 1143–1145; Thomas, 1 R. 437–438; Gov't Ex. 27, 2 R. 634.)

Finally, the courts have frequently declared Lehigh Coal Company to be a mere instrumentality of Lehigh Railroad. Thus, in the former *Reading Case*, 183 Fed. 427, 461, Judge Buffington said:

> The substantial identity of the several defendant railroads and their respective subsidiary coal companies is shown in the proofs. Take, for example, the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. * * * *The coal company is the subsidiary, corporate hand of the railroad company,* and, while its corporate entity is separate, yet in work, profit, interest, and official personnel, it is but an *alter ego* of the railroad company itself. And such is the view taken of this relation by the courts. [Italics ours.]

In the same case on appeal this Court took substantially the same view, saying (226 U. S. 342–343):

> That the Delaware, Lackawanna & Western Railroad Company was itself the owner of coal lands and was engaged in mining, transporting and marketing its own coal, *and that the other railway defendants* [among them the Lehigh Valley Railroad Co.] *were also engaged, through their subsidiary coal companies, in mining and selling coal,* as well as in transporting the coal so mined, is not determinative of any issue here presented. [Italics ours.]

In *Interstate Commerce Commission* v. *Baird* (194 U. S. 25), in holding that the secretary of Lehigh *Railroad* must produce for the inspection of the Commission the 65 per cent contracts to which Lehigh *Coal* Company was a party, Mr. Justice Day, delivering the opinion of this Court, said (p. 43):

> Here is a railroad company engaged at once in the purchase of coal *through a company which it practically owns* and the transportation of the same coal through different States to the seaboard. [Italics ours.]

In the same case in the circuit court Judge Lacombe said (123 Fed. 969–171):

> It appears by the record that the capital stock of the Lehigh Valley Coal Company is all owned by the Lehigh Valley Railroad Company, and it may fairly be contended that its transactions, if not those of an agent of the railroad company, were conducted solely in its interests.

In *Lehigh Valley R. Co.* v. *Rainey*, 112 Fed. 487, the Circuit Court for the Eastern District of Pennsylvania said (p. 488):

> *The identity of interest* between the two corporations (Lehigh Valley Railroad Company and Lehigh Valley Coal Company) was *so plain that it seemed idle to question it*, so far as its practical effect upon the matter at issue was concerned, although, of course, the court did not intend to treat as nonexistent for all purposes the legal distinction between the two separate corporate entities. But dealing with real things, and not with mere shows, it was clear to my mind that (for the purposes of the case before me) *the coal company was mining as the scarcely veiled hand of the railroad* company, and therefore that it made no difference at all what rate of freight was formally charged by the railroad company for hauling coal. [Italics ours.]

Finally, Judge Hough in the court below in the present case said (5 R. 230; 225 Fed. 399, 403):

> The Lehigh Valley Coal Company has from its creation done as it was ordered to do by the Lehigh Valley Railroad.

Lehigh Coal Company being thus a mere instrumentality of Lehigh Railroad, it follows that Lehigh Railroad has an interest in the coal of Lehigh Coal Company and that coal mined by Lehigh Coal Company is mined under the authority of Lehigh Railroad. (*United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 273–274; *Lackawanna Case*, 238 U. S. 516, 529.)

II.

LEHIGH COAL SALES COMPANY LIKEWISE IS BUT A MERE INSTRUMENTALITY OF LEHIGH RAILROAD: THEREFORE, THE TRANSFER TO LEHIGH COAL SALES COMPANY OF THE TITLE TO COAL MINED BY LEHIGH COAL COMPANY AND COXE BROS. & COMPANY, INC., DOES NOT DISSOCIATE LEHIGH RAILROAD FROM SUCH COAL, AND THE TRANSPORTATION THEREOF BY LEHIGH RAILROAD VIOLATES THE COMMODITY CLAUSE.

The court below decided this point against the Government wholly upon the authority of the decision of the Circuit Judges of the Third Circuit in the *Lackawanna Case*, 213 Fed. 240, *which has since been reversed by this Court*, 238 U. S. 516.

This Court there defined as follows the dissociation necessary to enable a railroad company to transport, without violating the Commodity Clause, coal mined by it or under its authority (238 U. S. 536):

> The railroad company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It can not retain the title *nor can it sell through an agent. It can not call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet* subject to the control of the railroad company. If the railroad sells coal at the mouth of the mines to one buyer or to many *it must not only part with all interest direct or indirect in the property but also with all control over it or over those to whom the coal is sold at the mines.* [Italics ours.]

That case as viewed by this Court is indistinguishable from this branch of the case at bar. The

parallelism may be best exhibited by stating the main features of the two cases in parallel columns:

PROVISIONS AS TO ORGANIZATION.

CASE AT BAR.	LACKAWANNA CASE.
The executive committee and the board of directors of Lehigh Railroad passed resolutions in favor "of taking some action in the matter of organizing such coal sales company." (2 R. 619–21.)	No formal action was proved to have been taken on the matter by the directors or executive committee of D. L. & W. Railroad.
Directors of Lehigh Railroad, in advance of any corporate action by Lehigh Coal Company, declared extra dividend exactly sufficient in amount to enable each stockholder to subscribe to his quota of stock in the new company. (2 R. 620–621.)	Managers of D. L. & W. Railroad declared extra dividend equal to double the amount necessary to enable each stockholder to subscribe to his quota of stock in the new company. (Rec. in D. L. & W. Case, 9–10.)
Later in the same day the directors of Lehigh Coal Company approved the plan (Mr. Thomas, the president, retiring from the chair in order to escape the absurdity of presenting a letter embodying the plan from himself as president of Lehigh Railroad), and directed the officers to cause a new corporation, to be called Lehigh Coal Sales Company, to be organized for the purpose of purchasing at the mines the coal mined and purchased by Lehigh Coal Company upon terms to be agreed upon before the transportation should be commenced. (2 R. 656–7, 636–7.)	

CASE AT BAR—contd.	LACKAWANNA CASE—contd.
Directors of Lehigh Railroad issued circulars inviting its stockholders to subscribe *pro rata* to stock of the new company. (2 R. 620–1, 629–32.)	Directors of D. L. & W. Railroad issued circulars inviting its stockholders to subscribe *pro rata* to stock of the new company. (Rec. in D. L. & W. Case, 9–10.)
Directors of Lehigh Railroad furnish each stockholder with blank power of attorney authorizing Drexel & Company to subscribe to his quota of stock of the new company, and to collect the dividend upon the railroad stock and apply it in payment of subscription. (4 R. 2192.)	Officers of D. L. & W. R. R. furnish each stockholder with a blank form of subscription to stock in new company containing a direction to the treasurer of the Railroad Company to apply half of the special dividend in payment of subscription. (Rec. in D. L. & W. Case 11.)
Holders of 97 per cent of the stock of Lehigh Railroad subscribe to the stock of the new company. (2 R. 704.)	Holders of 99 per cent of the stock of D. L. & W. R. R. Co. subscribe to the stock of the new company. (Rec. in D. L. & W. Case 12, 287.)
The remainder of the stock is taken by Drexel & Company (3 R. 1253–4), one of whose members, E. T. Stotesbury, is a director in Lehigh Railroad, while another, H. G. Lloyd, is to be a director in the new company. (3 R. 1280, 1939.)	The remainder of the stock of the new company is taken by certain employees of the new company, on condition that they would not sell within five years. (Rec. in D. L. & W. Case 58, 59, 70.)
The new company is incorporated under a name which, while devoid of geographic appropriateness, implies its connection with Lehigh Railroad by embodying the distinctive words "Lehigh Valley". (4 R. 2451.) That such should be the name of the new corporation was required by the directors of Lehigh Coal Company. (2 R. 657.)	The new company is incorporated under a name which, while devoid of geographic appropriateness, implies its connection with D. L. & W. Railroad by embodying the distinctive words "Delaware, Lackawanna and Western". (Rec. in D. L. & W. Case 143.)

CASE AT BAR—contd.	LACKAWANNA CASE—contd.
The new company allowed to appropriate and use the distinctive device or trade mark of Lehigh Railroad. (1 R. 238, 259–60; 2 R. 705; and 1 R. 11–13; 2 R. 627.)	
J. W. Skeele, vice-president and sales manager of Lehigh Coal Company, submitted a list of names and said that these gentlemen would be the first board of directors of the new company. (3 R. 1939.)	The vice-president and general counsel of the D. L. & W. Railroad suggested the names of the first directors of the new company. (Rec. in D. L. & W. Case 35.)
Officers of new company selected from among the officers of Lehigh Railroad or Lehigh Coal Company (3 R. 1901–1902; 1 R. 235, 240), and most of the directors of new company proved to have some connection with Lehigh Railroad or Lehigh Coal Company, or with some director thereof. (2 R. 701–702; 2 R. 623, 624; 1 R. 240; 2 R. 647, 649; 3 R. 1282, 2042.)	Officers of new company selected from among officers of D. L. & W. R. R.; and the president of D. L. & W. R. R., its vice president and four sons of members of its board of managers, and one of the lawyers who assisted in formulating the plan of "dissociation" are made the first directors of the new company. (Rec. in D. L. & W. Case 33, 34, 44–5, 66, 278, 326.)
New company takes over entire force of selling agents and employees of Lehigh Coal Company. (1 R. 240.)	New company takes over entire force of selling agents and employees of the coal department of D. L. & W. Railroad. (Rec. in D. L. & W. Case 13, 23–4.)
At the time of taking testimony 81.48 per cent of the stock of the new company was held by stockholders of Lehigh Railroad. (1 R. 520; 2 R. 994.) [1]	At the time of taking testimony 94.76 per cent of the stock of the new company was held by stockholders of D. L. & W. R. R. (Rec. in D. L. & W. Case, 40, 387.)

[1] The community of membership and control of Lehigh Railroad and Lehigh Coal Sales Company at the time of the taking of testimony is shown in detail below:

The 5 largest stockholders in L. V. Railroad Co. hold in the aggregate 11.8 per cent of the stock of L. V. R. R. Co. and also 15 per cent of the stock of L. V. C. Sales Co.

CASE AT BAR—contd.

The terms of the contract between Lehigh Coal Company and the new corporation were settled by so-called "negotiations" between "Mr. Skeele and Mr. Wilson on the one side and Mr. Warriner and Judge Wheaton on the other" (3 R. 1261, 1905); and of the two supposed to represent the new company, one, Mr. Wilson, was at the time drawing a salary from Lehigh Railroad as general auditor, though the only work he was doing was participating in the formation of the new company (3 R. 1966), while the other, Mr. Skeele, was still an officer of Lehigh Coal Company and of Coxe Bros. & Co. Inc. (2 R. 645–648.)

LACKAWANNA CASE—contd.

The terms of the contract between the D. L. & W. R. R. and the new corporation were settled by the general counsel of the railroad and two gentlemen specially retained by him, namely, Mr. John G. Johnson and Mr. F. L. Stetson, the latter being supposed to represent the new company and subsequently paid out of its treasury. (Rec. in D. L. & W. Case 25–8.)

PROVISIONS OF THE CONTRACT.[1]

CASE AT BAR.

Lehigh Coal Company (the instrumentality of Lehigh Railroad) sells to Lehigh Coal Sales Company all mined, marketable coal owned by the former in transit or in storage at the date of the

LACKAWANNA CASE.

D. L. & W. Railroad sells to the D. L. & W. Coal Company all mined, marketable coal owned by the former, in transit or in storage at the date of the contract, except such coal as the vendor elects

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The 25 largest stockholders in L. V. Railroad Co. hold in the aggregate 26 per cent of the stock of L. V. R. R. Co. and also 25.8 per cent of the stock of L. V. C. Sales Co.

The 50 largest stockholders in L. V. Railroad Co. hold in the aggregate 35.7 per cent of the stock of L. V. R. R. Co. and also 31 per cent of the stock of L. V. C. Sales Co.

Persons who are stockholders in both companies hold in the aggregate 71.76 per cent of the stock of L. V. R. R. Co. and also 81.48 per cent of the stock of L. V. C. Sales Co.

N. B.—Except as specifically noted, the foregoing facts are taken from Govt. Ex. 123, 2 R. 993–994, and testimony of Storck, 1 R. 519–520.

From L. V. C. S., Ex. 18., 4 R. 2493, it appears that 342,237 shares out of a total of 1,212,156 shares outstanding of L. V. R. R. stock were held by persons who were not stockholders in the L. V. Coal Sales Co., leaving 869,919, or 71.76 per cent, to be held by persons who held stock in both companies.

[1] Only the substance of the provisions is given here. The exact terms of the two contracts are set forth in full in parallel columns in Appendix M, *infra*, p. 180, the words and phrases common to each being printed in italics.

CASE AT BAR—contd.	LACKAWANNA CASE—contd.
contract, except such coal as the vendor elects to retain for its own use; payment therefor to be made in 30 days,—the coal in transit at the market price prevailing at the mines and the coal in storage at prices fixed in the contract, varying slightly from the prices fixed in the earlier D. L. & W. contract. (5 R. 56.)	to retain for its own use in the conduct of its business as a common carrier; payment therefor to be made in 30 days,—the coal in transit at the market price at the mines and the coal in storage at prices fixed in the contract. (Rec., D. L. & W. case, 365–366.)
Lehigh Coal Company agrees to sell to Lehigh Coal Sales Company all coal subsequently mined or purchased by the former, f. o. b. cars at the mines, except coal retained for its own use or for the use of Lehigh Railroad in the conduct of its business as a common carrier or to be sold at retail at the mines without transportation by rail. (5 R. 59–61.)	D. L. & W. Railroad Company agrees to sell to the D. L. & W. Coal Company all coal subsequently mined or purchased by the former, f. o. b. cars at the mines, except coal retained for its own use in the conduct of its business as a common carrier or to be sold at the mines without transportation by rail. (Rec., D. L. & W. case, 368–369.)
The prices to be paid for the prepared sizes are 65% of the current general average prices prevailing at New York Harbor, with somewhat lower percentages for the smaller sizes in accordance with the usual 65% scale, subject to a sliding discount as to the coal mined by the Lehigh Coal Company of 7% for the first year, 6% for the second, 5% for the third, 3% for the fourth, and 1% for the fifth. (5 R. 61–62.)	The prices to be paid for the prepared sizes are 65% of the current general average prices prevailing at New York Harbor, with somewhat lower percentages for the smaller sizes in accordance with the usual 65% scale. (Rec., D. L. & W. case, 369, 370.)
Deliveries to be made as called for by Lehigh Coal Sales Company, Lehigh Coal Company agreeing to work its mines to full capacity, but neither to be liable for inabil-	The amounts of coal to be delivered and sold by D. L. & W. Railroad to D. L. & W. Coal Company to be at the absolute option of D. L. & W. Railroad, which is to be under

CASE AT BAR —contd.	LACKAWANNA CASE—contd.
ity to make or accept deliveries on account of strikes, etc. (5 R. 59–60.)	no liability for failure to supply D. L. & W. Coal Company with such amount of coal as it may desire. (Rec., D. L. & W. case, 368.)
The coal to be prepared according to the standards and sizes fixed in the contract, with a proviso that if the conditions of trade shall at any time require a higher standard of preparation Lehigh Coal Company shall conform to such higher standard, but shall be reimbursed by Lehigh Coal Sales Company for any increased expense involved. (5 R. 63–64.)	The coal to be properly prepared in accordance with the past practice and standards of the seller, subject to a general proviso that if by reason of changes in market conditions, etc., modifications or changes in the contract should fairly be made, and the parties cannot agree with respect thereto, the matter shall be referred to arbitration. (Rec., D. L. & W. case, 370, 371.)
Lehigh Coal Sales Company to assume and carry out certain agency and sales contracts of Lehigh Coal Company set out in the schedule attached to the contract. (5 R. 58.)	D. L. & W. Coal Company to take over the sales agency contracts of D. L. & W. Railroad, mentioned in the contract, and the contracts for the sale of coal to various customers to be set forth in a schedule. (Rec., D. L. & W. case, 367.)
Lehigh Coal Sales Company to sell no coal or other fuel for itself or any other persons, except coal bought from Lehigh Coal Company under this contract and except such coal or fuels as may be necessary to comply with existing sales agency and other sales contracts of Lehigh Coal Company, provided that it may handle not more than 300,000 tons annually of bituminous coal if absolutely necessary according to trade conditions in order to maintain and develop its trade in the coal covered by this contract. (5 R. 60.)	D. L. & W. Coal Company to purchase no coal from any other person or corporation than D. L. & W. Railroad Company unless with the latter's written consent or to enable it to comply with the terms of the sales agency and other sales contracts of the D. L. & W. Railroad Company. (Rec., D. L. & W. case, 368.)

CASE AT BAR—contd.	LACKAWANNA CASE—contd.
Lehigh Coal Sales Company to use its best efforts to develop trade and increase its sales and widen its market for the coal. (5 R. 59.)	D. L. & W. Coal Company to conduct the business of selling the coal of D. L. & W. Railroad Company in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by D. L. & W. Railroad Company. (Rec., D. L. & W. case, 370.)
No express provision in the contract other than the above quoted agreement to use its best efforts to develop trade and increase its sales and widen its markets; but this provision is construed by the parties as obliging Lehigh Coal Sales Company to remain in markets which for the time being are unprofitable.[1]	D. L. & W. Coal Company to continue to fill the orders of all responsible present customers of D. L. & W. Railroad, even though as to some of such customers the sales may be unprofitable, it being understood that at the contract prices the entire business of D. L. & W. Coal Company will be conducted with profit. (Rec., D. L. & W. case, 370.)
Lehigh Valley Coal Company to lease or sublease to Lehigh Coal Sales Company for the term of the contract, trestles, storage plants and other facilities at a "fair rental" (5 R. 56–58), which was fixed by contemporaneous lease at 4% of the value of the demised premises the lessee to pay taxes, repairs, and insurance. 1 R. 101–104, 108–109, 158–159, 162; 3 R. 1323, 1932; 5 R. 66–71.	D. L. & W. Railroad to lease to D. L. & W. Coal Company certain trestles and other properties at a rental equal to 5% of their agreed value including good will, the lessee to keep the premises insured and in repair, but without any provision obliging the lessee to pay taxes.

[1] Mr. Lyman D. Smith, a director of Lehigh Coal Sales Company, Lehigh Coal Company, and Coxe Bros. & Co., Inc., and Vice President of Lehigh Railroad (3 R. 1236, 1242, 1259), testified as follows (3 R. 1280):

"Q. You testified as to a desire on the part of the Coal Company that the Sales Company should continue certain markets which were for the time being at least unprofitable?—A. Yes, sir.

"Q. Will you point out to me any provision in the contract Exhibit No. 3, which requires the Coal Sales Company to continue in any such markets?—A. There is a general clause in there that they will use their best endeavors to increase the sale of Lehigh Valley coal.

"Q. And that you construe as obliging them to continue in unprofitable markets?—A. Yes."

CASE AT BAR—contd.	LACKAWANNA CASE—contd.
Lehigh Coal Sales Company is forbidden to provide itself with additional facilities unless Lehigh Coal Company shall have refused on application to provide and lease them to it for the life of this contract, and then only subject to right of Lehigh Coal Company to purchase them at a valuation at any time. (5 R. 58–59.)	
Contract to run for a term of 10 years, subject to the right of either party to terminate the same at any time on 6 months notice to the other. (5 R. 65.)	Contract to run for 18 months and thereafter until terminated by either party upon 6 months notice to the other. (Rec., D. L. & W. case, 371.)

The parallel between the two cases was strongly emphasized below by the defendants themselves. Thus, the brief for Lehigh Coal Sales Company stated (p. 157):

> The case of United States *v.* Delaware, Lackawanna & Western R. R. Co. and Delaware, Lackawanna & Western Coal Co., 213 Fed. 240; this case is on all fours with the case at bar, in all essential particulars * * *.

The court below likewise found that the differences between the two cases were "wholly unsubstantial" (5 R. 228); but, as above stated, decided against the Government on the authority of the decision of the Circuit Judges in the *Lackawanna Case*, which had not then been reversed by this Court.

There are, it is true, in the *Lackawanna Case* a few minor circumstances which are not found in the case at bar, but it can not reasonably be contended that

these are sufficient to make any difference in the result. As said in the brief for Lehigh Coal Sales Company in the court below (p. 157):

> There are minor differences in the Lackawanna Case from ours, differences of situation of the parties, of the terms of the sales contract and the leasing of storage plants and facilities; they are, however, believed to be inconsequential.

Indeed, the few pertinent circumstances in the *Lackawanna Case* which do not exist in the present case are outweighed by countervailing circumstances not found in the *Lackawanna Case*. Since, however, the decision in that case is believed to be controlling of this portion of the case at bar, there is no necessity to do more than mention the various particulars which make the present case even stronger for the Government than the *Lackawanna Case*, such, for example, as:

(1) The fact that the prices charged Lehigh Coal Sales Company for the coal in storage at the date of the contract were unreasonably low, in some cases even too low to pay the freight rates from the mines to the place of storage, showing that Lehigh Railroad (through Lehigh Coal Company) retained an interest in the business of Lehigh Coal Sales Company.[1]

[1] The inadequacy of the prices fixed in the contract for the coal in storage (5 R. 56) will become evident by comparing them with the sum of the market price at the mines (Govt. Ex. 111, 2 R. 961, showing the price paid for coal in transit, which under the contract, 5 R. 56, was the market price prevailing at the mines) and the freight rate from the mines to the various storage plants (Govt. Ex. 130, 2 R. 1022). It will thus be seen that the prices received by Lehigh Coal Company were less than the sum of the

(2) The fact that Lehigh Railroad further discriminated in favor of Lehigh Coal Sales Company by leasing to it (through Lehigh Coal Company) the only storage plants on its line. (Govt. Ex. 4, 5 R. 66–71; Grier, 1 R. 328–329; Wilson 3 R. 1976.)[1]

(3) The fact that Lehigh Railroad (through Lehigh Coal Company) subsidizes Lehigh Coal Sales Company, and discriminates in its favor as against other shippers, by allowing it a large rebate in the form of a sliding discount from the usual 65 per cent scale of prices amounting to more than $1,000,000 for one year.[2]

(4) The fact that the contract between Lehigh Coal Company and Lehigh Coal Sales Company prohibits the latter from buying or building any trestles or other facilities except after refusal of Lehigh Coal Company to provide and lease the same to it for the life of the contract, and then only subject to the right of Lehigh Coal Company to purchase them at any time at a valuation. (Govt. Ex. 3, 5 R. 58–59.)

(5) The fact that Lehigh Coal Sales Company

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market value at the mines plus the freight rate to the storage plants. Testimony that the prices fixed in the contract practically netted "book value" of coal in storage (Wilson 3 R. 1911) can not overcome the above facts, as no clear evidence was forthcoming how that "book value" was reached. (3 R. 1969.)

[1] As coal storage plants are a facility connected with transportation (Wilson 3 R. 1926–7, 1985–6; Grier 1 R. 341, 3 R. 2057) the leasing of these plants under the authority of the Railroad Company to one shipper was an illegal discrimination against other shippers (*Sou. Pac. Term. Co. v. Interstate Commerce Commission*, 219 U. S. 498, 524–525). (See also *supra*, pp. 52–55.)

[2] See *supra*, pp. 55–57.

ships exclusively via Lehigh Railroad as initial carrier even when other lines are equally available.[1]

Subsequent to the decision in the *Lackawanna Case*, the Interstate Commerce Commission after reviewing the relations between Lehigh Railroad, Lehigh Coal Company and Lehigh Coal Sales Company, as well as the relations between the other anthracite carriers and their affiliated coal companies, found as follows (*Anthracite Rate Case*, 35 I. C. C. 220, 255):

> Corporate charters and contracts, as used by these carriers, are merely devices whereby the business of mining, transporting, and selling the anthracite production of each carrier and its allied coal company are united under one management and controlled by one paramount power.

[1] The Louise Colliery, of the Raub Coal Company, is connected both with the Lehigh Railroad and with the D. L. & W. Railroad (L. V. R. R. Ex. 54, 4 R. 2305), and its entire output except coal for local consumption at the colliery, is sold to Lehigh Coal Sales Company. (L. V. R. R. Ex. 52, 4 R. 2301.) Out of total shipments of 122,513 tons in the year ending June 30, 1913, not one ton went via the D. L. & W. Railroad, but the whole was shipped via the Lehigh Railroad. (L. V. R. R. Ex. 52, 4 R. 2301.)

The output of Mt. Lookout Colliery is sold part to the Lehigh Coal Sales Company and part to the D. L. & W. Coal Company (L. V. R. R. Ex. 52, 4 R. 2301), yet the shipments from this colliery via the Lehigh Railroad, namely, 152,681.12 tons, exactly equal the tonnage sold to Lehigh Coal Sales Company, namely, 144,624 tons, plus 8,057.12 tons used for supply coal by Lehigh Railroad. (L. V. R. R. Ex. 52, 4 R. 2301.) In other words, all the tonnage sold to Lehigh Coal Sales Company was shipped via Lehigh Railroad and all the tonnage sold to the D. L. & W. Coal Company was shipped via the D. L. & W. Railroad. It is evident, therefore, that there was no competition for the transportation of coal sold to either of those companies. At all collieries which are connected with more than one railroad and whose output is not monopolized by one of those railroads, a part of the coal is shipped to market over each of the competing roads. (L. V. R. R. Ex. 52, 4 R. 2301; Coyle, 3 R. 2030-2031; Kahn, 1 R. 574-575.)

Like the defendants in the *Lackawanna Case*, the present defendants quote a passage from the Report of the Attorney General for 1912 as follows (p. 24):

> By this arrangement both the railroad company and the coal companies *seem* to have parted in good faith with title to the coal before transportation begins and *it is claimed* therefore that transportation is free from the prohibition of the Commodities Clause as construed by the Supreme Court in 213 U. S., 412. *The question will be submitted to the court at an early day.* [Italic ours.]

To this we make the same reply as in the *Lackawanna Case* (Govt. Brief, p. 36):

> This was obviously intended as a statement of what was claimed by the proponents of the arrangement to be its effect, and so far from being an acceptance of the claim, definite notice is given that "the question will be submitted to the court at an early day." In due course that was done and the case [the case at bar] is now pending.

The defendant also made an effort to show parol approval of the arrangements between Lehigh Coal Company and Lehigh Coal Sales Company by some person connected with the Department of Justice, but the testimony was not only mere hearsay, but wholly inconclusive.[1] Moreover, such approval, even

[1] Mr. Lyman D. Smith testified that one of the present counsel of record for the Lehigh Railroad (who did not himself take the stand) had told the witness that he (counsel) had "approached the Department of Justice" and had some conversation from which he inferred that the pro-

if established, could not estop the Government of the United States from enforcing the law as established by this Court in the *Lackawanna Case*.

The essential facts of this case and the *Lackawanna Case* being thus substantially alike, it must be held that Lehigh Coal Sales Company is a mere instrumentality of Lehigh Railroad for the same reasons that it was held by this Court that the Delaware, Lackawanna & Western Coal Company was a mere instrumentality of the Delaware, Lackawanna & Western Railroad Company.

It follows that the transportation by Lehigh Railroad of coal held in the name of Lehigh Coal Sales Company violates the Commodity Clause.[1]

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posed arrangements would be satisfactory. On cross-examination the witness testified as follows (3 R. 1273):

"Q. Whom do you mean by 'Department of Justice'? A. Why, it was given, but I cannot recall the names of the parties he saw at that time.

Q. It was not the Attorney General of the United States? A. I am not sure of that.

Mr. Bolze: Was it Mr. Wickersham?

The Witness. I don't recall that. I only remember the fact he had approached some officer.

Q. The fact he told you he had approached some officer or employee of the Department of Justice? A. Yes, sir.

Q. And he had some informal conversation? A. Yes, sir.

Q. With some person employed in the Department of Justice? A. Yes, sir."

[1] While the foregoing discussion has been directed more particularly to coal mined by Lehigh Coal Company and sold to Lehigh Coal Sales Company under the contract of March 1, 1912, substantially the same principles are applicable to coal mined by Cone Brothers & Co., Inc., or by independent producers and sold to Lehigh Coal Sales Company. Since the annulment of the 65 per cent contracts between the Lehigh Coal Company and Cone Bros. & Co., and certain independent operators, the output of Cone Bros. & Co., and of those producers has been sold not to Lehigh Coal Company and by it to Lehigh Coal Sales Company as formerly, but directly to Lehigh Coal Sales Company under agreements revocable on short notice. (Gov't Ex. 112, 2 R. 962-965; Wilson, 3 R. 1919-1923.) The purchase price in every case is a percentage of the general

CONCLUSION.

The decree of the District Court should be reversed, with directions—

First, to adjudge that Lehigh Railroad in combination with Lehigh Coal Company and other controlled corporations has restrained and monopo-

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average tidewater prices. The Lehigh Coal Company, by virtue of the clause in the contract of March 1, 1912, with Lehigh Coal Sales Company, forbidding the latter (with certain immaterial exceptions) to deal in any coal not purchased from Lehigh Coal Company, has a right to require Lehigh Coal Sales Company to cease all these direct purchases from Coxe Bros. & Co. or independent operators at any time. (5 R. 60.) The Railroad thus retains control "over those to whom the coal is sold at the mines" (238 U. S. 536), and the buyer is as much a "puppet subject to the control of the railroad" as it is in respect of coal mined by Lehigh Coal Company. As shown above, Coxe Bros. & Co. is, like Lehigh Coal Company, an *alter ego* of the Lehigh Railroad (*supra* pp. 116-121), and, therefore, coal mined by it is mined under the authority of Lehigh Railroad. As its sales of coal to Lehigh Coal Sales Company are made at a price equal to a percentage of the current tidewater prices, the Railroad, through Coxe Bros. & Co. as its *alter ego*, is interested in maintaining such prices, and, therefore, under the decision in the *Lackawanna Case*, has an indirect interest in the coal during transportation. (238 U. S. 531.)

The agency contract between the Lehigh Coal Company and G. B. Markle & Company, now the G. B. Markle Company, has never been abrogated, and, although the Lehigh Coal Sales Company is now carrying out this contract, it is doing so merely as the subagent or nominee of the Lehigh Coal Company, since the Markle Company has expressly refused to assent to a novation and still holds the Lehigh Coal Company responsible as agent. (Markle, 3 R. 1598, 1600.) The responsibility of Lehigh Coal Company as agent covers losses from degradation in transportation or from defaults on the part of purchasers (Markle, 3 R. 1594-1600), and for this reason as well as for the broader reasons above set forth, Lehigh Coal Company, and through it Lehigh Railroad, clearly has an indirect interest in the Markle coal during transportation.

lized and is restraining and monopolizing trade and commerce in anthracite coal produced along and transported over its lines in violation of the Anti-Trust Law, and is transporting such coal in violation of the Commodity Clause.

Second, to grant relief substantially as prayed in the petition.

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SEPTEMBER, 1916.

APPENDICES.

APPENDIX A.

TABLE SHOWING AMOUNT OF ADVANCES (EXCLUDING INTEREST WAIVED) BY LEHIGH RAILROAD TO LEHIGH COAL COMPANY ON OPEN ACCOUNT, AND PORTIONS FORGIVEN, FUNDED, AND PAID.

Due to L. V. R. R. Co. by L. V. Coal Co. on open account on Nov. 30th, 1889....		[1] $8,843,296.69	
Advanced by L. V. R. R. Co. to L. V. Coal Co. on open account since June 30, 1889.		[2] 24,751,561.32	
Total to be accounted for.....			$33,594,858.01
Forgiven outright.....		[3] 5,743,649.98	
Funded— [4]			
1893. By accepting at par L. V. Coal Co. 1st mtge. 5% gold bonds [5].....	[5] $10,500,000.00		
1897. By accepting at par L. V. Coal Co. 2d mtge. 5% gold bond.....	[5] 5,000,000.00		
1905. By accepting certificates of indebtedness of L. V. Coal Co.....	[5] 2,050,000.00		
		17,550,000.00	
Satisfied by property or assets transferred by L. V. Coal Co. to L. V. R. R. Co. in payment:			
Bills receivable, etc.	[5] 46,953.33		
Stock Wyoming Coal & Land Co.....	[5] 130,000.00		
		176,953.33	
Paid in cash by L. V. Coal Co. to L. V. R. R. Co.....		[6] 10,124,254.70	
Total accounted for.....			33,594,858.01

[1] 2 R. 1029.

[2] Ascertained by adding the figures in columns "b" and "c" in Govt. Ex. 50, 2 R. 683.

[3] 2 R. 683 column ("e"), and 1 R. 206, 513–514 (verifying subject to a minor correction the table in the Petition, 5 R. 26).

[4] For disposition made of the various securities of the Coal Company by which the advances were funded, see infra Appendix B, ~~B~~.

[5] Govt. Ex. 50, 2 R. 683–4, especially note to column "d" on p. 684, and also 1 R. 216, and 3 R. 1410.

[6] Govt. Ex. 50, 2 R. 683–4. Ascertained by adding the items in column "d" on p. 683 and subtracting therefrom the sum of the items in notes "d" on p. 684 representing according to the "instructions" at bottom of p. 683 payments otherwise than in cash.

APPENDIX B.

TABLE SHOWING DISPOSITION OF BONDS OR CERTIFICATES OF INDEBTEDNESS OF COAL COMPANIES FORMERLY HELD BY LEHIGH RAILROAD.

1.

		Par value.
Delano Land Co. 7% bonds bought 1874-92 for $772,555.88 (4 R. 2334)		$759,000
Disposed of by L. V. R. R. Co. as follows:		
Sold from time to time prior to 1892 to trustee of sinking fund for $761,095.55 in all (4 R. 2334)		759,000

2.

Delano Land Co. 5% bonds bought in 1892 for $1,188,000 (4 R. 2334)		1,200,000
Disposed of by L. V. R. R. Co. as follows:		
Sold to Drexel & Co. in 1892 for $1,200,000 (4 R. 2334)		1,200,000

3.

Hazleton Coal Co. 5% bonds due 1936 (1 R. 35) acquired in 1896 in part payment for transfer of coal lands derived by L. V. R. R. Co. from its constituent companies, the Beaver Meadow R. R. & Coal Co. and Hazleton R. R. (or Coal) Co. (1 R. 220).		2,000,000
Disposed of by L. V. R. R. Co. as follows:		
Redeemed by L. V. ctfs. (4 R. 2334)	$156,000	
Exchanged for $724,000 L. V. C. Co. ctfs. of indebtedness (2 R. 654-655, 4 R. 2334), payable only at pleasure of debtor (1 R. 219-20), on which interest was ultimately paid in 1912 at 4% (1 R. 191)	1,844,000	
		2,000,000

4.

Lehigh Valley Coal Co. 5% first mtge. gold bonds due 1933 (1 R. 401), accepted by L. V. R. R. Co. at par in part payment of advances on open account (see Appendix A)		10,500,000
Disposed of by L. V. R. R. Co. as follows:		
Sold to the public 1893-5 (after having been guaranteed by L. V. R. R. Co., 1 R. 401-2; 2 R. 634) at a loss of $30,712.50 charged to profit and loss (1 R. 401-2; 4 R. 2334)	$9,100,000	
Sold to Drexel & Co. at 95 after L. V. R. R. Co. had guaranteed payment of principal and interest and assented to a reduction in the interest rate from 5% to 4% in consideration of only $98,000 in L. V. C. Co. ctfs. of indebtedness (1 R. 399, 402; 2 R. 655-6) and at a loss to L. V. R. R. Co. of $135,288 (1 R. 515-6)	1,400,000	
		10,500,000

APPENDIX B—Continued.

5.

Lehigh Valley Coal Co. 2d mtge. 5% gold bond due 1947 (1 R. 216), accepted at par in 1897 in part payment of advances. (See Appendix A)		Par value. $5,000,000
Disposed of by L. V. R. R. Co. as follows:		
Exchanged for an equal amount par value of certificates of indebtedness (2 R. 654) upon which interest was ultimately paid at the rate of only 4% (1 R. 191)		5,000,000

6.

Lehigh Valley Coal Co. certificates of indebtedness payable at pleasure of debtor, issued in 1905, as follows:		
To fund $2,050,000 advanced on open account to pay off L. V. C. Co. 5-10 yr. 5% coal pledge bonds held by Girard Trust Co. (3 R. 1410, 1686, 1687 and also Appendix A)	$2,050,000	
In exchange for $5,000,000 L. V. C. Co. 5% 2d mtge. bond due 1947 (1 R. 202; 2 R. 654)	5,000,000	
For stock and property of various coal companies transferred by L. V. R. R. Co. to L. V. Coal Co. (2 R. 653-5 and 614-5)	2,605,000	
In consideration of assent of L. V. R. R. Co. to reduction in rate of interest from 5% to 4% on $1,400,000 L. V. C. Co. 1st mtge. bonds due 1933 held by L. V. R. R. Co. (1 R. 187, and 2 R. 655-6)	98,000	
In exchange for $1,844,000 5% 1st mtge. bonds of Hazleton Coal Co. (1 R. 219) which had been consolidated into the L. V. Coal Co. (1 R. 201; and 2 R. 653-5)	724,000	
To pay off outstanding bonds of Wyoming Coal & Land Co. (2 R. 655)	60,000	
		10,537,000
Disposed of by L. V. R. R. Co. as follows:		
Paid in cash by L. V. C. Co. (2 R. 659; 3 R. 1350)	$3,037,000	
Exchanged for an equal amount par value L. V. C. Co. 50-yr. 4% debentures (3 R. 1350; 2 R. 659-60), which are still held by L. V. R. R. Co. (1 R. 198)	7,500,000	
		10,537,000

APPENDIX C.

TABLE SHOWING LOSSES OF LEHIGH COAL COMPANY ON COAL PURCHASED UNDER PERCENTAGE CONTRACTS.

I.

Under the 60% scale while the "adjusted" freight rates were in force—Losson prepared sizes sold f. o. b. vessel Perth Amboy.

As the cost price was 60% of the price at tidewater and as the "adjusted" freight rate exactly consumed the remaining 40%, nothing whatever was left to defray the cost of selling and handling, so that a loss was always incurred equal to the cost of selling and handling, as shown by the following atble for November, 1898:

Price received at Perth Amboy f. o. b. vessel		[1] $3.48
Cost price 60% of the general average tidewater price and bearing the same relation to the freight rate as 60 does to 40	$2.00	
Approximate cost of selling and handling (1 R. 547, 2 R. 906, 1043)	.10	
Approximate degradation (1 R. 548)	.05	
		2.24
Amount left for freight		1.24
Freight rate (adjusted) (2 R. 834–835)		1.39
Loss per ton		.15

II.

Under the 65% scale after the adoption of flat freight rates and prior to an increase in the price of coal which followed the great coal strike of 1902 (2 R. 1110)—Loss on stove coal [2] from Wyoming region sold at Perth Amboy f. o. b. vessel in January, 1901. [3]

Average price received at Perth Amboy f. o. b. vessel (1 R. 552)		$4.44
Cost price 65% of general average tidewater price (1 R. 513)	$2.88	
Approximate expense of selling and handling	.10	
Approximate degradation (1 R. 548)	.05	
		3.03
Amount left for freight		1.41
Published freight rate (4 R. 2356)		1.56
Loss per ton		.14

[1] The adjusted freight rates, which were $1.393 per ton for this month (2 R. 834–5), were 40% of the average price received at New York Harbor, which therefore gives the figure in the table as the average price for prepared sizes during the month.

[2] Stove coal commanded as a rule the highest price of any of the sizes (2 R. 995–6, 997, 1007–18), so that the loss on stove coal would be less than the loss on other sizes.

[3] This month was chosen because in a winter month relatively high prices were obtained, so that the loss would be smaller than in other months. The record does not contain the data necessary to compute a similar table for other months in this year.

APPENDIX C—Continued.

III.[1]

Under 65% scale after the increase in price of coal which followed the great coal strike of 1902—Results as to all sizes of coal from Wyoming region sold at Perth Amboy f. o. b. vessel, in 1907.[2]

JANUARY.

Size.	Price received at Perth Amboy, f. o. b.[3]	Cost price.[4]	Expense of selling and handling.[5]	Degradation or wastage.[6]	Amount left for freight.[7]	Published freight rate to Perth Amboy.[8]	Loss per ton.	Profit per ton.
Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	$0.02
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.94	1.58	.05	.....	1.31	1.40	.09	.....
Buck No. 1	2.44	1.19	.05	.....	1.20	1.20	.....	.....
Buck No. 2	1.57	.50	.05	.....	1.02	1.10	.08	.....
Buck No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....

FEBRUARY.

Broken	$4.22	$2.75	$0.10	$0.05	$1.32	$1.55	$0.23	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	$0.20
Stove	4.96	3.24	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.89	1.58	.05	.....	1.26	1.40	.14	.....
Buck No. 1	2.43	1.19	.05	.....	1.19	1.20	.01	.....
Buck No. 2	1.56	.50	.05	.....	1.01	1.10	.09	.....
Buck No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....

[1] The following table appears in the record as Govt. Ex. 126 (2 R. 998–1000). The computations were made by an expert accountant who testified to their accuracy (Storck, 1 R. 522–525). The source of the basic figures from which the computations were made is indicated in succeeding notes.

[2] The year 1907 is admitted to be a "really typical year" (Tompkins, 3 R. 1679).

[3] The figures in this column were taken from Govt. Ex. 125 (2 R. 997), verified by the auditor of Lehigh Coal Company (Tompkins, 1 R. 549–550).

[4] The figures in this column were calculated by Mr. Storck according to the 65 per cent scale (which is set out 1 R. 494–495). The average prices of coal from the Wyoming region f. o. b. New York Harbor are stated in Govt. Ex. 125 (2 R. 997), verified (Tompkins 1 R. 549).

[5] What is technically known as the expense of "selling" is proved to be 4.65 cents per ton, and the expense of "handling" 5.72 cents per ton (Tompkins, 1 R. 547, verifying Govt. Ex. 139, 2 R. 1043). This makes a total of 10.37 cents per ton, whereas in the accompanying table 10 cents per ton is allowed as the expense of selling and handling the prepared sizes and 5 cents per ton as the expense of selling and handling the steam

APPENDIX C—Continued.

MARCH.

Size.	Price received at Perth Amboy, f. o. b.	Cost price.	Expense of selling and handling.	Degradation or wastage.	Amount left for freight.	Published freight rate to Perth Amboy.	Loss per ton.	Profit per ton.
Broken	$4.20	$2.74	$0.10	$0.05	$1.31	$1.55	$0.24	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	$0.02
Stove	4.97	3.24	.10	.05	1.58	1.55	.....	.03
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.91	1.58	.05	.....	1.28	1.40	.12	.....
Buck No. 1	2.46	1.20	.05	.....	1.21	1.20	.....	.01
Buck No. 2	1.55	.50	.05	.....	1.00	1.10	.10	.....
Buck No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....

APRIL.

Broken	$4.20	$2.74	$0.10	$0.05	$1.31	$1.55	$0.24	.....
Egg	4.45	2.90	.10	.05	1.40	1.55	.15	.....
Stove	4.45	2.91	.10	.05	1.39	1.55	.16	.....
Chestnut	4.45	2.90	.10	.05	1.40	1.55	.15	.....
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	$0.01
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck No. 3	1.37	.30	.05	.....	1.02	1.10	.08	.....

MAY.

Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.55	2.96	.10	.05	1.44	1.55	.11	.....
Stove	4.55	2.97	.10	.05	1.43	1.55	.12	.....
Chestnut	4.55	2.96	.10	.05	1.44	1.55	.11	.....
Buck No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	$0.01
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck No. 3	1.39	.30	.05	.....	1.04	1.10	.06	.....

sizes, so that the table is more than fair to the defendants and tends to show smaller losses than actually occurred.

[6] The amount of degradation or wastage due to the breaking down of prepared sizes into smaller sizes in transportation and transshipment was stated by the auditor of Lehigh Coal Company to be 3.26 cents per ton (1 R. 547), but this figure was arrived at by distributing the degradation among all sizes of coal sold—i. e., the steam sizes as well as the prepared sizes—whereas in fact the degradation occurs virtually exclusively on the prepared sizes and amounts to about 5 cents for each ton of prepared sizes (Tompkins, 1 R. 547–548). Accordingly, in the accompanying table the amount allowed for degradation is 5 cents per ton on prepared sizes. Nothing is allowed for degradation on the steam sizes, because in fact practically no such wastage occurs.

[7] The figures in this column were ascertained by Mr. Storck by subtracting the sum of the cost price, the expense of selling and handling, and the loss due to degradation from the price received by Lehigh Coal Company at Perth Amboy.

[8] The figures in this column may be verified by L. V. R. R. Ex. 79 (4 R. 2356).

APPENDIX C—Continued.

JUNE.

Size.	Price received at Perth Amboy, f. o. b.	Cost price.	Expense of selling and handling.	Degradation or wastage.	Amount left for freight.	Published freight rate to Perth Amboy.	Loss per ton.	Profit per ton.
Broken	$4.21	$2.74	$0.10	$0.05	$1.32	$1.55	$0.23	.....
Egg	4.62	3.02	.10	.05	1.45	1.55	.10	.....
Stove	4.65	3.03	.10	.05	1.47	1.55	.08	.....
Chestnut	4.65	3.02	.10	.05	1.48	1.55	.07	.....
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	$0.01
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....

JULY.

Broken	$4.24	$2.75	$0.10	$0.05	$1.34	$1.55	$0.21	.....
Egg	4.75	3.08	.10	.05	1.52	1.55	.03	.....
Stove	4.75	3.09	.10	.05	1.51	1.55	.04	.....
Chestnut	4.75	3.09	.10	.05	1.51	1.55	.04	.....
Pea	2.94	1.60	.05	.....	1.29	1.40	.11	.....
Buck No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	$0.01
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck No. 3	1.44	.30	.05	.....	1.09	1.10	.01	.....

AUGUST.

Broken	$4.21	$2.74	$0.10	$0.05	$1.32	$1.55	$0.23	.....
Egg	4.85	3.16	.10	.05	1.54	1.55	.01	.....
Stove	4.86	3.16	.10	.05	1.55	1.55	.....	.....
Chestnut	4.85	3.16	.10	.05	1.54	1.55	.01	.....
Pea	2.92	1.60	.05	.....	1.27	1.40	.13	.....
Buck No. 1	2.44	1.19	.05	.....	1.20	1.20	.....	.....
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	$0.10
Buck No. 3	1.44	.30	.05	.....	1.09	1.10	.01	.....

SEPTEMBER.

Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.95	3.20	.10	.05	1.60	1.55	.....	$0.05
Stove	4.95	3.21	.10	.05	1.59	1.55	.....	.04
Chestnut	4.95	3.21	.10	.05	1.59	1.55	.....	.04
Pea	2.94	1.61	.05	.....	1.28	1.40	.12	.....
Buck No. 1	2.44	1.25	.05	.....	1.14	1.20	.06	.....
Buck No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck No. 3	1.45	.30	.05	.....	1.10	1.10	.....	.....

APPENDIX C—Continued.

OCTOBER.

Size.	Price received at Perth Amboy, f. o. b.	Cost price.	Expense of selling and handling.	Degradation or wastage.	Amount left for freight.	Published freight rate to Perth Amboy.	Loss per ton.	Profit per ton.
Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.93	3.22	.10	.05	1.56	1.55	.....	$0.01
Stove	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Chestnut	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Pea	2.94	1.61	.05	.....	1.28	1.40	.12	.....
Buck. No. 1	2.45	1.20	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....

NOVEMBER.

Broken	$4.26	$2.74	$0.10	$0.05	$1.37	$1.55	$0.18	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	$0.01
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.96	3.23	.10	.05	1.58	1.55	.....	.03
Pea	2.93	1.62	.05	.....	1.26	1.40	.14	.....
Buck. No. 1	2.46	1.25	.05	.....	1.16	1.20	.04	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....

DECEMBER.

Broken	$4.25	$2.75	$0.10	$0.05	$1.35	$1.55	$0.20	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	$0.02
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.93	1.65	.05	.....	1.23	1.40	.17	.....
Buck. No. 1	2.45	1.25	.05	.....	1.15	1.20	.05	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.42	.30	.05	.....	1.07	1.10	.08	.....

APPENDIX D.

TABLE ANALYZING THE ONLY JOINT RATES ON ANTHRACITE COAL TO POINTS ON THE LEHIGH RAILROAD FROM COLLIERIES ON OTHER ROADS.[1]

Name of tariff.	Collieries from which rates apply.	Destinations to which rates apply.
Lehigh Valley Tariff I. C. C. D-508, Supplement No. 14 (2 R. 1081-4).	Red Ash colliery on Central R. R. of New Jersey.[2]	East Buffalo, Buffalo, and Suspension Bridge, N. Y.
	Collieries and washeries on Lehigh & New England Railroad.	Manchester, N. Y., East Buffalo, Buffalo, and Suspension Bridge, N. Y.
Central Railroad of New Jersey Tariff I. C. C. A-283 (1 R. 579).	Lee colliery.....	Perth Amboy.
Central Railroad of New Jersey Tariff I. C. C. AL-85 1 R. 579).	Hadley colliery.....	Pittston, Pa.
P. R. R. Rate Order No. DO-8177 (1 R. 580).	Lykens, Pa.....	South Bethlehem, Pa.

[1] This table does not include rates for transhipment by rail or water to ultimate destinations beyond the Lehigh Valley Railroad, the latter being a mere intermediate carrier, nor rates to points on the National Docks Railway between 28th Street, Bayonne, and Wayne Street, Jersey City. These rates are few in number, being as follows: Lehigh Valley Tariff I. C. C. D-508 Supplement No. 14, from collieries on Central R. R. of N. J. in Wyoming region to Buffalo for reshipment by water, and from Red Ash colliery to Buffalo for reshipment by rail or water, and Suspension Bridge for reshipment by rail, and from collieries on Lehigh & New England R. R. to Buffalo for reshipment by rail or water, and Suspension Bridge for reshipment by rail (2 R. 1081-4); Central R. R. of N. J. Tariff I. C. C. AA-27 from Alden colliery to Suspension Bridge for reshipment to Toronto (1 R. 578-9); P. R. R. Tariff A. I. C. C. 363 from collieries on the Pennsylvania, D. & H., and D. L. & W. Railroads to Buffalo for reshipment by rail or water, and Suspension Bridge for reshipment by rail.

Two tariffs are in effect from collieries on other roads to points on the National Docks Railway—Central R. R. of N. J. Tariff I. C. C. A-284 from collieries on Central R. R. of N. J. to points between 28th Street, Bayonne, N. J., and Wayne Street, Jersey City (1 R. 579); and P. R. R. Tariff A, I. C. C. 318 from collieries on P. R. R. to Communipaw, Bayonne, and Constable Hook, N. J. (1 R. 581-2). While the National Docks Railway is owned by the Lehigh Valley system, other railroads have trackage rights over it (1 R. 579), and it is in effect a joint terminal facility.

[2] This rate was put in only after complaint to the Interstate Commerce Commission. (2 R. 1072-80.)

N. B.—The foregoing are the *only* joint rates in effect on anthracite coal *to* Lehigh Valley points *from* collieries on other railroads. (1 R. 582.)

APPENDIX E.

LIST OF RAILROAD COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS, WHICH ADOPTED BY REFERENCE THE RESTRICTION IN THE GENERAL LAW OF 1849, NO. 76, P. 79, AGAINST EXERCISING ANY POWERS NOT INCIDENT TO TRANSPORTATION OF GOODS AND PASSENGERS AND AGAINST HOLDING ANY LAND NOT NECESSARY FOR TRANSPORTATION PURPOSES.

Milford & Matamoras R. R. Co., Laws of 1849, No. 417.
Chester Valley R. R. Co., Laws of 1850, No. 341.
Mahonoy & Wiconisco R. R. Co., Laws of 1850, No. 469, p. 1045.
Treverton, Mahonoy & Susquehanna R. R. Co., Laws of 1850, No. 325.
North Lebanon R. R. Co., Laws of 1850, No. 249, §5.
Pittsburgh & Erie R. R. Co., Laws of 1850, No. 427, §2.
Pittsburgh & Wheeling R. R. Co., Laws of 1850, No. 458, §11.
Pittsburgh & Steubenville R. R. Co., Laws of 1850, No. 439, p. 952.
Delaware & Cobb's Gap R. R. Co., Laws of 1851, No. 470, approved April 7, 1849.
Jefferson R. R. Co., Laws of 1851, No. 378, §7.
Lafayette R. R. Co., Laws of 1851, No. 381.
Mt. Carmel & Shamokin R. R. Co., Laws of 1851, No. 334.
Strasburgh R. R. Co., Laws of 1851, No. 46.
Susquehanna R. R. Co., Laws of 1851, No. 337.
Wilkesbarre & Scranton R. R. Co., Laws of 1851, No. 55.
Catawissa & Towanda R. R. Co., Laws of 1852, No. 36.
Cornwall & Phoenixville R. R. Co., Laws of 1851, No. 253.
Lawrenceville & Oswaya R. R. Co., Laws of 1852, No. 388, p. 665.
Lackawanna & Bloomsburg R. R. Co., Laws of 1852, No. 391, p. 669.
Millersburg & Bailysburg R. R. Co., Laws of 1852, No. 312, p. 706.
Norristown & Freemansburg R. R. Co., Laws of 1852, No. 265, p. 415.
Philadelphia, Easton & Water Gap R. R. Co., Laws of 1852, No. 382, p. 654.
Susquehanna & Erie R. R. Co., Laws of 1852, No. 401, p. 720.
Beallsville & Waynesburg R. R. Co., Laws of 1853, No. 261, p. 413.

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Chartiers Valley R. R. Co., Laws of 1853, No. 46, p. 42.
Delaware, Lackawanna & Western R. R. Co., Laws of 1853, No. 123, and Laws of 1855, No. 314, p. 302.
Delaware, Lehigh & Wyoming Valley R. R. Co., Laws of 1853, No. 131, p. 179.
Earp R. R. Co., Laws of 1853, No. 362, p. 647.
Erie City R. R. Co., Laws of 1853, No. 219, p. 330.
Gettysburg R. R. Co., Laws of 1853, No. 201, p. 300.
Kingessing & Philadelphia R. R. Co., Laws of 1853, No. 353, §2.
Lock Haven & Tyrone R. R. Co., Laws of 1853, No. 402, p. 737.
Middle Coal Field R. R. Co., Laws of 1853, No. 417, p. 775.
Mercer & New Castle R. R. Co., Laws of 1853, No. 411, p. 754.
North Western R. R. Co., Laws of 1853, No. 51, p. 53.
Mt. Pleasant R. R. Co., Laws of 1853, No. 312, p. 522.
Panther Creek & Laurel Run R. R. Co., Laws of 1853, No. 268, p. 432.
Venango R. R. Co., Laws of 1853, No. 178, p. 257.
Wrightsville, New Holland & Conewago R. R. Co., Laws of 1853, No. 399, p. 732.
Northern Central Ry. Co., Laws of 1854, No. 531, p. 537.
Brandywine R. R. Co., Laws of 1854, No. 695, p. 747.
Columbia & Octorara R. R. Co., Laws of 1854, No. 730, p. 820.
East Mahonoy R. R. Co., Laws of 1854, No. 450, p. 452.
Mt. Eagle & Tremont R. R. Co., Laws of 1854, No. 750, p. 875.
Philadelphia & Baltimore Central R. R. Co., Laws of 1854, No. 718, p. 792.
Philadelphia & Delaware River R. R. Co., Laws of 1854, No. 703, p. 759.
State Line R. R. Co., Laws of 1854, No. 735, p. 834.
Auburn & Port Clinton R. R. Co., Laws of 1855, No. 611, p. 665.
Mahoning & Susquehanna R. R. Co., Laws of 1855, No. 623, p. 687.
Miners' R. R. Co., Laws of 1855, No. 596, p. 618.
North Branch & Lackawanna R. R. Co., Laws of 1855, No. 584, p. 601.
Sinnemahoning & Pittsburg R. R. Co., Laws of 1855, No. 654, p. 740.
South Mountain R. R. Co., Laws of 1855, No. 630, p. 698.
Excelsior R. R. & Coal Co., Laws of 1856, No. 629, p. 656.
Attleborough R. R. Co., Laws of 1856, No. 366, p. 339.
Buffalo & Bradford R. R. Co., Laws of 1856, No. 152, p. 128.

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Duncannon, Landisburg & Broad Top R. R. Co., Laws of 1856, No. 602 and 644, pp. 608, 676.
Girard R. R. Co., Laws of 1856, No. 240, p. 220.
Jeddo & Carbon County R. R. Co., Laws of 1856, No. 599, p. 605.
Jersey Shore P. C. & S. L. R. R. Co., Laws of 1856, No. 593, p. 594.
Lackawanna & Lanesboro R. R. Co., Laws of 1856, No. 364, p. 337.
Lehigh Valley R. R. Co., Laws of 1856, No. 116, p. 96, and more specifically by Laws of 1857, No. 248, p. 209.
Lewisburg C. & S. R. R. Co., Laws of 1856, No. 594, p. 595.
Navigation R. R. Co., Laws of 1856, No. 601, p. 606.
Reading & Lehigh R. R. Co., Laws of 1856, No. 312, p. 295.
Tyrone & Clearfield R. R. Co., Laws of 1856, No. 598, p. 603.
Littlestown R. R. Co., Laws of 1857, No. 720, p. 711.
East Brandywine R. R. Co., Laws of 1857, No. 724, p. 720.
Fayette County R. R. Co., Laws of 1857, No. 701, p. 665.
Franklin & Bedford R. R. Co., Laws of 1857, No. 725, p. 721.
Ligonier & Latrobe R. R. Co., Laws of 1857, No. 719, p. 710.
Littlestown R. R. Co., Laws of 1857, No. 720, p. 711, act approved February 17, 1854.
Macauley Mountain R. R. Co., Laws of 1857, No. 726, p. 723.
Meadville R. R. Co., Laws of 1857, No. 786, p. 801.
Quakake R. R. Co., Laws of 1857, No. 371, p. 324.
Schuylkill, Haven & Lehigh River R. R. Co., Laws of 1857, No. 770, p. 782.
Tyrone & Loch Haven R. R. Co., Laws of 1857, No. 139, p. 122.
Washington & Maryland Line R. R. Co., Laws of 1857, No. 764, p. 775.
Western Transportation Co., Laws of 1857, No. 749, p. 761.
Chestnut Hill & Cheltenham R. R. Co., Laws of 1858, No. 488, p. 503.
Danville R. R. Co., Laws of 1858, No. 535, p. 590.
Erie & Pittsburg R. R. Co., Laws of 1858, No. 495, p. 511.
Lehigh & Delaware Water Gap R. R. Co., Laws of 1858, No. 516, p. 562.
Locust Gap R. R. Co., Laws of 1858, No. 357, p. 319.
McKean County R. R. Co., Laws of 1858, No. 531, p. 584.
Philadelphia & Darby R. R. Co., Laws of 1858, No. 510, p. 556.
Reading & Columbia R. R. Co., Laws of 1858, No. 536, p. 591.
Bedford R. R. Co., Laws of 1859, No. 746, p. 800.

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Chester, Leiperville & Darby R. R. Co., Laws of 1859, No. 694, p. 697.

Council Ridge & White Haven R. R. Co., Laws of 1859, No. 122, p. 126.

Wyoming Gravity R. R. Co., Laws of 1859, No. 755, p. 814 (formerly Delaware, Lehigh & Wyoming Valley R. R. Co.).

Ebensberg & Cresson R. R. Co., Laws of 1859, No. 315, p. 314.

Ironton R. R. Co., Laws of 1859, No. 714, p. 739.

Penn Haven & White Haven R. R. Co., Laws of 1859, No. 737, p. 786.

Plymouth R. R. Co., Laws of 1859, No. 197, p. 195.

Port Kennedy R. R. Co., Laws of 1859, No. 698, p. 706.

Pottsville & Minersville R. R. Co., Laws of 1859, No. 709, p. 722.

Union R. R. Co., Laws of 1859, No. 223, p. 218.

Easton & Nazareth R. R. Co., Laws of 1860, No. 612, p. 719.

Mahanoy & Broad Mountain R. R. Co., Laws of 1860, No. 671, p. 822.

Mahoning R. R. Co., Laws of 1860, No. 690, p. 856.

Newry R. R. Co., Laws of 1860, No. 663, p. 809.

North West Portage R. R. Co., Laws of 1860, No. 660, p. 805.

Oil Creek R. R. Co., Laws of 1860, No. 613, p. 722.

Plymouth & Wilkes-Barre R. R. & Bridge Co., Laws of 1860, No. 691, p. 857.

Attleborough R. R. Co., Laws of 1861, No. 719, p. 813.

Johnstown & Ashtola Tramroad & R. R. Co., Laws of 1861, No. 709, p. 784.

Mifflin & Centre County R. R. Co., Laws of 1861, No. 721, p. 815.

Nesquehoning Valley R. R. Co., Laws of 1861, No. 663, p. 711.

Philipsburg & Waterford R. R. Co., Laws of 1861, No. 724, p. 820.

Potter County R. R. Co., Laws of 1861, No. 720, p. 814.

Shawmut & Ridgeway R. R. Co., Laws of 1861, No. 589, p. 633.

Susquehanna & Philadelphia R. R. Co., Laws of 1861, No. 735, p. 842.

Farmers R. R. Co. of Venango County, Laws of 1862, No. 380, p. 371.

Little Beaver Valley R. R. Co., Laws of 1862, No. 152, p. 153.

New Castle & Beaver Valley R. R. Co., Laws of 1862, No. 16, p. 12.

Union R. R. Co., Laws of 1862, No. 520, p. 560.

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Wissahickon, Roxborough & Plymouth. R. R. Co., Laws of 1862, No. 349, p. 335.

Moshannon R. R. Co., Laws of 1863, No. 354, p. 349.

Allegheny City & Freeport R. R. Co., Laws of 1864, No. 916, p. 1055.

Berks & Chester R. R. Co., Laws of 1864, No. 461, p. 525.

Connellsville & Southern Pa. Ry. Co., Laws of 1864, No. 914, p. 1041.

Cross Cut Ry. Co., Laws of 1864, No. 631, p. 733.

Frankford & Holmesburg R. R. Co., Laws of 1864, No. 954, p. 1115.

Lawrence R. R. & Transportation Co., Laws of 1864, No. 501, p. 573.

Mahoning & French Creek R. R. Co., Laws of 1864, No. 943, p. 1095.

New Castle & Franklin R. R. Co., Laws of 1864, No. 95, p. 96.

Oil Creek & Ridgeway R. R. Co., Laws of 1864, No. 946, p. 1099.

Phoenix Mining R. R. Co., Laws of 1864, No. 495, p. 565.

Scotland & Mt. Alto R. R. Co., Laws of 1864, No. 625, p. 729.

Warren & Tidioute R. R. Co., Laws of 1864, No. 920, p. 1064.

Wilkesbarre & Philadelphia R. R. Co., Laws of 1864, No. 926, p. 1071.

Coalbrookdale R. R. Co., Laws of 1865, No. 597, p. 605.

Connoquenessing Valley R. R. Co., Laws of 1865, No. 532, p. 546.

Enterprise R. R. Co., Laws of 1865, No. 479, p. 490.

Greene County R. R. Co., Laws of 1865, No. 762, p. 766.

Middle Creek R. R. Co., Laws of 1865, No. 637, p. 641.

Mill Creek R. R. Co., Laws of 1865, No. 738, p. 737.

Moselem R. R. Co., Laws of 1865, No. 744, p. 744.

Mt. Pleasant R. R. Co., Laws of 1865, No. 515, p. 533.

Octoraro & Quarryville R. R. Co., Laws of 1865, No. 376, p. 383.

Pennsylvania & N. Y. Canal & R. R. Co., Laws of 1865, No. 412, p. 427, and Laws of 1842, No. 121, p. 411.

Pine Grove Coal R. R. Co., Laws of 1865, No. 783, p. 793.

Sandy Lick R. R. Co., Laws of 1865, No. 913, p. 958.

Sinnemahoning Portage R. R. Co., Laws of 1865, No. 79, p. 94.

Titusville & Union R. R. Co., Laws of 1865, No. 529, p. 543.

Waynesburg & Monongahela River R. R. Co., Laws of 1865, No. 879, p. 915.

Chester Creek R. R. Co., Laws of 1866, No. 906, p. 932.

Duncannon, Bloomfield & Broad Top R. R. Co., Laws of 1866, No. 968, p. 1003.

Tionesta Valley R. R. Co., Laws of 1866, No. 409, p. 448.

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Farmers' R. R. of Lancaster & Berks Counties, Laws of 1866, No. 343, p. 380.
Franklin & Wallaceville R. R. Co., Laws of 1866, No. 1109, p. 1217.
Manufacturers & Consumers Anthracite R. R. Co., Laws of 1866, No. 284, p. 313.
Ohioville R. R. Co., Laws of 1866, No. 322, p. 351.
Susquehanna & Delaware R. R. Co., Laws of 1866, No. 169, p. 197.
Caledonia & South Mt. R. R. Co., Laws of 1867, No. 143, p. 164.
Delaware Valley R. R. Co., Laws of 1867, No. 876, p. 953.
Ephrata & Lancaster R. R. Co., Laws of 1867, No. 1298, p. 1383.
Monongahela Valley R. R. Co., Laws of 1867, No. 820, p. 897.
Strasburg R. R. Co., Laws of 1867, No. 1306, p. 1393.
Tidioute R. R. Co., Laws of 1867, No. 798, p. 879.
Turbotville & McEwensville R. R. Co., Laws of 1867, No. 1291, p. 1376.
Adams County R. R. Co., Laws of 1868, No. 1095, p. 1181.
Berlin R. R. Co., Laws of 1868, No. 235, p. 266.
Delaware River & Lancaster R. R. Co., Laws of 1868, No. 330, p. 429.
Dickinson Run R. R. & Bridge Co., Laws of 1868, No. 1128, p. 1224.
Doe Run & White Clay Creek R. R. Co., Laws of 1868, No. 425, p. 465.
Hamburg & Slatington R. R. Co., Laws of 1868, No. 1116.
Kishacoquillas Valley R. R. Co., Laws of 1868, No. 796, p. 855.
Peach Bottom Ry. Co., Laws of 1868, No. 721, p. 778.
Pequea Valley R. R. Co., Laws of 1868, No. 1103, p. 1189.
Reading & Trevorton R. R. Co., Laws of 1868, No. 1183, p. 1288.
Stone Creek R. R. Co., Laws of 1868, No. 652, p. 705.
Wellsborough & Lawrenceville R. R. Co., Laws of 1868, No. 1151, p. 1255.
Willow Bank & Burns Spring R. R. Co., Laws of 1868, No. 1175.
Wyoming Valley & Ontario R. R. Co., Laws of 1868, No. 334, p. 370.
Lake Shore Ry. Co., Laws of 1868, No. 484, p. 524.
Erwinna & Hossensack R. R. Co., Laws of 1869, No. 1298, p. 1339.
Homer, Cherry Tree & Susquehanna R. R. Co., Laws of 1869, No. 1293, p. 1329.
Juniata R. R. Co., Laws of 1869, No. 1062, p. 1073.
Montrose Ry. Co., Laws of 1869, No. 1253, p. 1270.
Morrison's Cove R. R. Co., Laws of 1869, No. 1274, p. 1306.

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Pickering Valley R. R. Co., Laws of 1869, No. 665, p. 686.
Sharpsburg, New Castle & Butler R. R. Co., Laws of 1869, No. 1167, p. 1177.
Stoney Creek R. R. Co., Laws of 1869, No. 1325, p. 1372.
Uniontown & Dunkard R. R. Co., Laws of 1869, No. 1267, p. 1295.
Uniontown & W. Virginia R. R. Co., Laws of 1869, No. 1302, p. 1343.
Bedford & Bridgeport R. R. Co., Laws of 1870, No. 1230, p. 1360; and No. 445, p. 453.
New Freedom & Md. Line R. R. Co., Laws of 1870, No. 717, p. 779.
Buffalo Valley R. R. Co., Laws of 1870, No. 1232, p. 1362.
Conewango Valley R. R. Co., Laws of 1870, No. 530, p. 550.
Hickman Run R. R. Co., Laws of 1870, No. 1251, p. 1379.
Hunlock's Creek & Muncy R. R. Co., Laws of 1870, No. 1281, p. 1411.
Montour R. R. Co., Laws of 1870, No. 900, p. 984.
Mt. Pleasant & Broad Ford R. R. Co., Laws of 1870, No. 899, p. 983.
Shrewsbury Ry. Co., Laws of 1870, No. 1164, p. 1267.
Somerset & Mineral Pt. R. R. Co., Laws of 1870, No. 1228, p. 1358.
West Chester & Phoenixville R. R. Co., Laws of 1870, No. 349, p. 361.
Bachman Valley R. R. Co., Laws of 1871, No. 764, p. 846.
Bell's Gap R. R. Co., Laws of 1871, No. 671, p. 737.
Berks County R. R. Co., Laws of 1871, No. 420, p. 466.
Clarion County R. R. Co., Laws of 1871, No. 22, p. 18.
Cowanesque Valley R. R. Co., Laws of 1871, No. 1326, p. 1443.
Erie & Meadville Southern Ry. Co., Laws of 1871, No. 1369, p. 1499.
Lockhaven, Nittany & Sugar Valley Narrow Gauge R. R. Co., Laws of 1871, No. 831, p. 943.
Meadville & Titusville R. R. Co., Laws of 1871, No. 1343, p. 1466.
Northampton R. R. Co., Laws of 1871, No. 1337, p. 1457.
North & West Branch R. R. Co., Laws of 1871, No. 746, p. 814.
Pittsburg & Virginia R. R. Co., Laws of 1871, No. 1377, p. 1510.
Selingrove & North Branch R. R. Co., Laws of 1871, No. 461, p. 518.
Shawnee R. R. & Bridge Co., Laws of 1871, No. 1327, p. 1444.
South West Pa. Ry. Co., Laws of 1871, No. 372, p. 405.
State Line & Juniata R. R. Co., Laws of 1871, No. 1358, p. 1484.

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Tionesta & Clarion R. R. Co., Laws of 1871, No. 1353 p. 1478.

Youngsville & State Line R. R. Co., Laws of 1871, No. 1131, p. 1228.

Bendersville R. R. Co., Laws of 1872, No. 1150, p. 1263.

Brandy Camp R. R. Co., Laws of 1872, No. 1118, p. 1213.

Conestoga Valley R. R. Co., Laws of 1872, No. 1144, p. 1252.

Dayton & Pine Creek R. R. Co., Laws of 1872, No. 1178, p. 1303.

Hanover Junction & Susquehanna R. R. Co., Laws of 1872, No. 552, p. 602.

Lancaster & Reading Narrow Gauge R. R. Co., Laws of 1872, No. 1168, p. 1287.

Media & Chester Narrow Gauge R. R. Co., Laws of 1872, No. 1199, p. 1324.

Philadelphia, Delaware & Chester Central R. R. Co., Laws of 1872, No. 1154, p. 1269.

Pennsylvania & Lehigh R. R. Co., Laws of 1872, No. 802, p. 835.

Sherman's Valley R. R. Co., Laws of 1872, No. 242, p. 254.

Tacony Valley R. R. Co., Laws of 1872, No. 1120, p. 1214.

Allegheny & Fayette R. R. Co., Laws of 1873, No. 885, p. 806.

Bradford R. R. Co., Laws of 1873, No. 714, p. 657.

Brownsville & Youghiogheny Ry. Co., Laws of 1873, No. 1111, p. 1063.

Delaware County R. R. Co., Laws of 1873, No. 1072, p. 1012.

Duncannon, Bloomfield & Loysville R. R. Co., Laws of 1873, No. 1117, p. 1067.

Falls City & W. Va. R. R. Co., Laws of 1873, No. 1124, p. 1076.

Hanover & York R. R. Co., Laws of 1873, No. 902, p. 822.

Juniata & Potomac R. R. Co., Laws of 1873, No. 1007, p. 947.

New Florence & Ligonier Valley Ry. Co., Laws of 1873, No. 1087, p. 1029.

Newport & Sherman's Valley Narrow Gauge R. R. Co., Laws of 1873, No. 802, p. 728.

Philadelphia & Merion R. R. Co., Laws of 1873, No. 872, p. 786.

Sharon, Sharpsville & Mercer R. R. Co., Laws of 1873, No. 1103, p. 1056.

Tuscarora Valley R. R. Co., Laws of 1873, No. 1068, p. 1009.

Waynesboro & Blue Ridge R. R. Co., Laws of 1873, No. 1110, p. 1062.

Little Lehigh R. R. Co., Laws of 1874, No. 224, p. 334 (passed in 1873).

APPENDIX F.

LIST OF RAILROAD COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS CONTAINING A PROHIBITION AGAINST ENGAGING IN ANY BUSINESS OTHER THAN THE TRANSPORTATION OF GOODS AND PASSENGERS, EITHER IN SUBSTANTIALLY THE SAME TERMS AS THE GENERAL LAW OF 1849, NO. 76, P. 79, OR STILL MORE SPECIFICALLY DIRECTED AGAINST MINING.

The President, Directors, & Company of the Pa. R. R. Co., act of March 31st, 1823, ch. 148, §18.

Columbia, Lancaster & Philadelphia R. R. Co., Laws of 1825–6, ch. 71, p. 216.

Orwigsburg R. R. Co., Laws of 1827–8, No. 169, p. 403, §2.

Northern Liberties & Penn Township R. R. Co., Laws of 1828–9, No. 172, p. 270, §2.

Philadelphia & Delaware County R. R. Co., act of April 2, 1831, Laws of 1830–31, No. 173, §3, p. 354.

West Chester R. R. Co., act of February 18, 1831, Laws of 1830–31, No. 54, §3, p. 76.

Philadelphia & Trenton R. R. Co., act of February 23, 1832, Laws of 1831–2, No. 64, §2, p. 88.

Rock Cabin & T. R. R. Co., Laws of 1830–31, No. 210, §2, p. 460.

Philadelphia, Germantown & N. R. R. Co., Laws of 1830–31, No. 44, p. 53.

Cumberland Valley R. R. Co., Laws of 1830–31, No. 180, §2, p. 375.

Adams County R. R. Co., Laws of 1831–2, No. 130, §2, pp. 295–6.

Norristown, Berks & Lehigh R. R. Co., Laws of 1831–2, No. 137, p. 344.

Wyoming & Lehigh R. R. Co., Laws of 1832–3, No. 134, §2, p. 135.

Susquehanna R. R. Co., Laws of 1832–3, No. 166, §2, p. 420.

West Philadelphia R. R. Co., Laws of 1835–6, No. 25, §2, p. 24.

Delaware County Branch R. R. Co., Laws of 1834–5, No. 113, §2, p. 177.

Wrightsville & Gettysburg R. R. Co., Laws of 1835–6, No. 52, p. 148.

New Hope, Doylestown & N. R. R. Co., Laws of 1835–6, No. 56, §2, p. 178.

Chester & Delaware County R. R. Co., Laws of 1835–6, No. 77, §2, p. 236.

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Hestonville & Schuylkill R. R. Co., Laws of 1835–6, No. 177, §21, §24, p. 653.

Harrisburg & Sunbury R. R. Co., Laws of 1836–7, No. 89, §3, p. 251.

Columbia & Maryland Line R. R. Co., Laws of 1836–7, No. 102, p. 312.

Pittsburg & Laughlinstown R. R. Co., Laws of 1836–7, No. 94, p. 288.

Pittsburg & Susquehanna R. R. Co., Laws of 1836–7, No. 75, §29, p. 184.

Sunbury & Erie R. R. Co., Laws of 1836–7, No. 75, §1, pp. 173–4.

Athens & Ithaca R. R. Co., Laws of 1837–8, No. 33, §2, p. 87.

Tioga & Seely Creek R. R. Co., Laws of 1837–8, No. 33, §27, §28, pp. 96–8.

Hamburg, Allentown, Bethlehem & Easton R. R. Co., Laws of 1837–8, No. 33, §53, §55, pp. 107–110.

Strasburg R. R. Co., act of June 9, 1832, Laws of 1831–2, No. 229, §3, p. 566.

Williamsport & Elmira R. R. Co., act of June 9, 1832, Laws of 1831–2, No. 229, §23, §24, p. 574.

Marietta R. R. Co., act of June 9, 1832, Laws of 1831–2, No. 229, §46, §48, p. 584.

Portsmouth & Lancaster R. R. Co., act of June 9, 1832, Laws of 1831–2, No. 229, §68, §70, p. 592.

Oxford R. R. Co., act of June 9, 1832, Laws of 1831–2, No. 229, §90, §91.

Philadelphia & Reading R. R. Co., act of April 4, 1833, Laws of 1832–33, No. 76, §2, p. 146.

Norristown & Mt. Carbon R. R. Co., act of April 6, 1833, Laws of 1832–3, No. 85, §2, p. 174.

West Chester & Port Deposit R. R. Co., Laws of 1834–5, No. 163, §8, §9, p. 300.

Wrightsville & York R. R. Co., Laws of 1834–5, No. 183, §7, p. 378.

Reading & Brandywine R. R. Co., Laws of 1835–6, No. 2, §3, p. 7.

Warren & Pine Grove R. R. Co., Laws of 1835–6, No. 39, §2, p. 89.

Bristol & Newtown R. R. Co., Laws of 1835–6, No. 53, §2, p. 159.

Newville Branch R. R. Co., Laws of 1835–6, No. 84, §§19 and 20.

Willardsburg & Jersey Shore R. R. Co., Laws of 1835–6, No. 87, §2.

APPENDIX F—Continued.

Lewisburg, Penn's Valley & Hollidaysburg R. R. Co., Laws of 1835–6, No. 110, §2.

Chambersburg & Loudon R. R. Co., Laws of 1835–6, No. 117, §2.

Lebanon Valley R. R. Co., Laws of 1835–6, No. 123, §2.

Erie R. R. Co., Laws of 1835–6, No. 125, §2.

Philadelphia & Port Deposit R. R. Co., Laws of 1835–6, No. 133, §1.

New Holland R. R. Co., Laws of 1835–6, No. 147, §3.

Catawissa & Towanda R. R. Co., Laws of 1835–6, No. 148, §2.

Richmond R. R. Co., Laws of 1835–6, No. 149, §2.

Towanda & Franklin R. R. Co., Laws of 1835–6, No. 151, §3.

Kensington & P. R. R. Co., Laws of 1835–6, No. 153, §2.

Pine Grove & S. H. R. R. Co., Laws of 1835–6, No. 156, §2.

New C stle R. R. Co., Laws of 1835–6, No. 161, §2.

Philadelphia & Taylorsville R. R. Co., Laws of 1835–6, No. 177, §2.

Huntingdon & Chambersburg R. R. Co., Laws of 1835–6, No. 180, §2.

Reading, F. & Susquehanna R. R. Co., Laws of 1835–6, No. 183, §3.

Williamsport R. R. Co., Laws of 1836–7, No. 110, §21.

Mifflinsburg & Catawissa Furnace R. R. Co., Laws of 1836–7, No. 104, §5, §6.

Pittsburg & Connellsville R. R. Co., Laws of 1836–7, No. 76, §2.

Washington & Pittsburg R. R. Co., Laws of 1836–7, No 68, §2.

Dividing Ridge R. R. Co., Laws of 1838–9, No. 82.

Loyalsock R. R. Co., Laws of 1838–9, No. 137, §2.

Philadelphia & New Hope R. R. Co., Laws of 1838–9, No. 136.

West Branch Franklin R. R. Co., Laws of 1838–9, No. 159.

Pottsville & Tusc. R. R. Co., Laws of 1840, No. 189, §2.

Harrisburg & P. G. R. R. Co., Laws of 1842, No. 64, §2.

Erie & North Eastern R. R. Co., Laws of 1842, No. 92, §2

Bear Mountain R. R. Co., Laws of 1842, No. 114, §3.

Fishing Creek S. & Sch. R. R. Co., Laws of 1844, No. 265, §2.

Shamokin, Mahanoy & Schuylkill R. R. Co., Laws of 1844, No. 295, §2.

Pennsylvania R. R. Co., Laws of 1846, No. 262, §2.

North Branch R. R. Co., Laws of 1846, No. 414, §3, printed in Laws of 1847, p. 31.

APPENDIX F—Continued.

Delaware, Lehigh, Schuylkill & Susquehanna R. R. Co. now Lehigh Valley R. R. Co.), Laws of 1848, No. 422, §2, p. 576.

York & Cumberland R. R. Co., Laws of 1848, No. 421, §2, p. 570.

Summit Branch R. R. Co., Laws of 1850, No. 54.

Hempfield R. R. Co., Laws of 1851, No. 516, p. 862.

Chestnut Hill R. R. Co., Laws of 1852, No. 388, p. 735 (approved April 10, 1848).

Lancaster, Lebanon & P. G. R. R. Co., Laws of 1852, No. 185, p. 745 (approved March 28, 1846).

Luzerne & Schuylkill R. R. Co. (later called the Philadelphia & North Branch R. R. Co.), Laws of 1852, No. 247, p. 755 (approved April 8, 1846).

*Fishing Creek R. R. Co., act of April 1, 1831, Laws of 1830–31, No. 161, §2, p. 328.

*Lorberry Creek R. R. Co., act of March 30, 1831, Laws of 1830–31, No. 136, §2, p. 255.

*Little Schuylkill & Susquehanna R. R. Co., act of March 21, 1831, Laws of 1830–1, No. 94, §2, p. 161.

*Swartara & Good Spring Creek R. R. Co., act of April 2, 1831, Laws of 1830–1, No. 174, §2, p. 363.

*Roush Creek R. R. Co., act of April 2, 1831, Laws of 1830–1, No. 175, §2, p. 366.

**Muddy Branch R. R. Co., act of April 14, 1834, Laws of 1833–4, No. 190, §2, p. 416.

*Mt. Carbon & Port Carbon R. R. Co., Laws of 1842, No. 118, §2.

**Susquehanna & Delaware Canal & R. R. Co., Laws of 1825–6, Ch. 60, p. 173, §28.

**Schuylkill East Branch Navigation Co. (afterwards called Little Schuylkill Navigation R. R. & Coal Co.), Laws of 1825–6, Ch. 11, p. 39, §16; and Laws of 1827–8, No. 170, p. 414; and Laws of 1828–9, No. 190, p. 309.

**Shamokin Canal Co., Laws of 1826–7, No. 173, p. 416, §23.

**Mill Creek & Mine Hill Navigation & R. R. Co., Laws of 1827–8, No. 45, §18, pp. 78–9.

*Mt. Carbon R. R. Co., Laws of 1828–9, No. 135, p. 201, §2, p. 203.

*Phillipsburg & Juniata R. R. Co., Laws of 1829–30, No. 58, p. 90.

*Tuscarora & Coal Run Tunnel & R. R. Co., Laws of 1829–30, No. 145, p. 234.

*Middle-Port & Pine Creek R. R. Co., Laws of 1829–30, No. 165, p. 294.

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*Lykens Valley R. R. Co., Laws of 1829–30, No. 190, p. 369.

**Tioga Navigation Co., Laws of 1825–6, Ch. 10, p. 28, and Laws of 1832–3, No. 77, p. 156.

Schuylkill & Dauphin Improvement & R. R. Co., Laws of 1857, No. 740, p. 743.

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* In these cases the statute contained a prohibition in substantially the following form:

"*Provided*, Nothing herein contained shall be considered as in any way giving to the said corporation any mining, trading, or banking privileges whatsoever, or any other liberties, privileges, or franchises but such as may be necessary or incident to the making of the said railroad: *Provided further*, That the said company shall at no time hold or possess any coal land for the purpose of carrying on the coal trade."

** In these cases the prohibition was in substantially the form in the preceding note, except that the second proviso was omitted.

APPENDIX G.

LIST OF RAILROAD COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS NOT EXPRESSLY PROHIBITING MINING OR TRADING BUT NOT AFFIRMATIVELY GRANTING SUCH POWER.

Schuylkill Valley R. R. & Nav. Co., Laws of 1826–7, No. 52, p. 92; Laws of 1827–8, No. 171, p. 417; Laws of 1828–9, No. 9, p. 10.

Southwark R. R. Co., act of April 2, 1831, No. 173, § 22.

Bald Eagle & Nittany Turnpike & R. R. Co., act of March 30, 1831, No. 139.

Washington & Pittsburg R. R. Co., act of March 18, 1831, No. 91.

Franklin R. R. Co., act of March 12, 1832, No. 76.

York & Maryland Line R. R. Co., act of March 14, 1832, No. 78.

Norristown & Valley R. R. Co., Laws of 1834–5, No. 166.

Plymouth R. R. Co., Laws of 1835–6, No. 43.

Phoenixville & Chester Springs R. R. Co., Laws of 1835–6, No. 84, §§ 3 and 4.

Beaver & Conneaut R. R. Co., Laws of 1835–6, No. 84, § 31.

Pittsburg, Kittanning & Warren R. R. Co., Laws of 1836–7, No. 105.

Chambersburg & Gettysburg R. R. Co., Laws of 1836–7, No. 110.

Marietta B. F. & P. R. R. Co., Laws of 1836–7, No. 104.

Hanover & Codorus R. R. Co., Laws of 1838–9, No. 200.

Huntingdon & Hollidaysburg R. R. Co., Laws of 1838–9, No. 199.

Shrewsbury R. R. Co., Laws of 1838–9, No. 74.

Mercer & Great Bend R. R. Co., Laws of 1838–39, Resolution No. 32, p. 694.

Danville R. R. Co., Laws of 1840, No. 157.

New York & Erie R. R. Co., Laws of 1841, No. 17.

Wilkinsburg R. R. Co., Laws of 1841, No. 122.

Bedford Mineral Springs R. R. Co., Laws of 1845, No. 199.

Schuylkill R. R. Co., Laws of 1845, No. 312.

New York & Erie R. R. Co., Laws of 1846, No. 151.

Ohio & Pennsylvania R. R. Co., Laws of 1849, No. 404, p. 754.

Hanover Branch R. R. Co., Laws of 1850, No. 387, p. 832.

APPENDIX G—Continued.

West Chester & Philadelphia R. R. Co., Laws of 1850, No. 418, p. 916.
Drake's Ferry & Broad Top R. R. Co., Laws of 1854, No. 755, p. 890.
Mahanoy Navigation Co., Laws of 1826–7, No. 58, p. 111.
Middle Coal Field Tunnel & R. R. Co., Laws of 1860, No. 653, p. 795.
Bethlehem R. R. Co., Laws of 1862, No. 541, p. 586.
Manor R. R. Co., Laws of 1865, No. 864, p. 894.
National R. R. & Transportation Co., Laws of 1865, No. 794, p. 802.
Philadelphia & North Branch R. R. Co., Laws of 1866, No. 342, p. 378.
Sharpsville & Wheatland & Sharon & Greenfield R. R. Co., Laws of 1870, No. 1210, p. 1320.
Manayunk & Roxborough Inc. Plane & Ry. Co., Laws of 1873, No. 960, p. 883.
South Side R. R. Co., Laws of 1873, No. 992, p. 931.
Treaty Island Bridge & R. R. Co., Laws of 1874, No. 349, p. 468.

APPENDIX H.

LIST OF THE MINING COMPANIES INCORPORATED BY SPECIAL ACTS OF THE LEGISLATURE OF PENNSYLVANIA WITHOUT POWER TO CONSTRUCT OR OPERATE RAILROADS OF ANY KIND.

Pennsylvania Mining Co., act of April 14, 1834, No. 158.
Penna. Bituminous Coal Land Co., Laws of 1835-6, No. 59.
Lykens Valley Coal Co., Laws of 1835-6, No. 162.
Shamokin Coal Co., Laws of 1835-6, No. 179, § 13.
Summit Coal Co., Laws of 1835-6, No. 46, § 1.
Hazleton Coal Co., Laws of 1835-6, No. 47, § 1. (See also *infra*, Appendix K.)
Buck Mountain Coal Co., Laws of 1835-6, No. 194, § 12.
Bloomsburg R. R. Iron Co., Laws of 1838-9, No. 152.
Susquehanna Coal Co., Laws of 1840, No. 220.
Baltimore Coal Co., Laws of 1841, No. 109, p. 286, §7.
Tioga Improvement Co., Laws of 1850, pp. 980-1.
Lackawanna Iron & Coal Co., Laws of 1853, No. 205, p. 306.
Pine Creek Coal Co., Laws of 1840, No. 222.
Allentown Iron Co., Laws of 1851, No. 283, p. 485.
Johnstown Iron Co., Laws of 1855, No. 600, p. 628.
Philipsburg Coal & Lumber Co., Laws of 1856, No. 328, p. 309.
Pittsburg & Youghiogheny Coal Co., Laws of 1856, No. 384.
Wyoming Coal & Iron Co., Laws of 1856, No. 205, p. 177.
Safe Harbor Iron Co., Laws of 1856, No. 643, p. 674.
Phoenix Iron Co., Laws of 1856, No. 633, p. 661.
Pottsville Mining & Mfg. Co., Laws of 1857, No. 618, p. 579.
Wampum Coal & Iron Co., Laws of 1858, No. 537, p. 593.
Donegal Iron Co., Laws of 1858, No. 507, p. 552.
Duncannon Iron Co., Laws of 1858, No. 497, p. 531.
Saucona Iron Co., Laws of 1858, No. 501, p. 539.
Union Coal & Iron Co., Laws of 1858, No. 515, p. 561.
Foster Coal & Iron Co., Laws of 1860, No. 616, p. 726.
Bedford Iron Co., Laws of 1859, No. 733, p. 780.
Eastern Iron Co., Laws of 1860, No. 680, p. 838.
Somerset Iron & Coal Co., Laws of 1861, No. 709, p. 795.
Brady's Bend Iron Co., Laws of 1861, No. 263, p. 261.
Roberts Iron Co., Laws of 1861, No. 730, p. 833.
Pioneer Iron Co., Laws of 1863, No. 586, p. 616.
Northern Iron Co., Laws of 1863, No. 605, p. 644.
Coal Ridge Improvement & Coal Co., Laws of 1864, No. 647, p. 754.
Greenwood Coal Co., Laws of 1864, No. 491, p. 557.

APPENDIX H—Continued.

Wyoming Coal & Transportation Co., Laws of 1864, No. 526, p. 629.
Lackawanna & Susquehanna Coal & Iron Co., Laws of 1864, No. 325, p. 391.
Lee Coal Co., Laws of 1864, No. 957, p. 1118.
Nanticoke Coal & Iron Co., Laws of 1864, No. 345, p. 412.
Union Coal Co., Laws of 1864, No. 514, p. 612.
Quaker Run Improvement Co., Laws of 1864, No. 649, p. 756.
East Pennsylvania Iron Co., Laws of 1864, No. 981, p. 1146.
Lehigh Rolling Mill Co., Laws of 1865, No. 845, p. 855.
North-Western Pennsylvania Mining Co., Laws of 1865, No. 810, p. 822.
West Creek Mfg. & Mining Co., Laws of 1865, No. 396, p. 408.
Derby Coal Co., Laws of 1866, No. 524, p. 546.
Pawnee Coal Co., Laws of 1866, No. 512, p. 534.
Steuben Coal Co., Laws of 1866, No. 1111, p. 1219.
Webster Coal Co., Laws of 1866, No. 1085, p. 1180.
Bingham Mining & Lumbering Co., Laws of 1866, No. 390, p. 427.
Kauffmann Iron Co., Laws of 1866, No. 922, p. 948.
Overland Mining Co., Laws of 1866, No. 820, p. 830.
Black Band Iron & Coal Co., Laws of 1867, No. 1220, p. 1285.
Caernavon Coal Co., Laws of 1867, No. 1129, p. 1201.
Philadelphia Coal Co., Laws of 1867, No. 676, p. 723.
Mt. Carmel Locust Mt. Coal Co., Laws of 1867, No. 1403, p. 1510.
Lehigh County Mining, Mfg. & Impr. Co., Laws of 1867, No. 925, p. 998.
Fort Allen Iron Co., Laws of 1867, No. 1157, p. 1227.
Philadelphia Iron & Steel Co., Laws of 1867, No. 1140, p. 1211.
American Mineral Land & Mining Co., Laws of 1867, No. 1400, p. 1506.
Lycoming Trout & Improvement Co., Laws of 1868, No. 1202, p. 1312.
Cambria Mining & Mfg. Co., Laws of 1869, No. 1313, p. 1357.
Lehigh Grain, Coal & Lumber Co., Laws of 1870, No. 844, p. 912.
Iron City Land Co., Laws of 1870, No. 760, p. 830.
Malvern Coal Co., Laws of 1871, No. 1357, p. 1482.
Laurel Run Improvement Co., Laws of 1871, No. 817, p. 915.
Eastern Iron Co., Laws of 1871, No. 86, p. 78.

APPENDIX H—Continued.

Central Land & Mining Co., Laws of 1871, No. 1372, p. 1502.
Columbia Land & Mining Co., Laws of 1871, No. 1373, p. 1503.
Rock Mount Mining Co., Laws of 1871, No. 745, p. 812.
Pottsville Steel, Iron & Coal Co., Laws of 1872, No. 1123, p. 1220.
Sullivan Anthracite Coal Co., Laws of 1872, No. 363, p. 393.
Danville Iron Co., Laws of 1872, No. 510, p. 547.
Warwick Iron Co., Laws of 1872, No. 610, p. 659.
Chestnut Hill Iron Ore Co., Laws of 1872, No. 656, p. 607.
Aughwick Mining & Exp. Co., Laws of 1872, No. 1117, p. 1211.
Red Bank Mining Co., Laws of 1872, No. 937, p. 983.
Delano Land Co., Laws of 1872, No. 359, p. 388.
Green Land Co., Laws of 1872, No. 1218, p. 1351; and No. 693, p. 737.
North Mt. Coal Co., Laws of 1873, No. 983, p. 922.
Riverside Coal Co., Laws of 1873, No. 986, p. 924 (passed April 15, 1867).
Riverside Coal Co., Laws of 1873, No. 1118, p. 1068 (passed April 4, 1872).
Mt. Washington Land & Improvement Co., Laws of 1873, No. 1097, p. 1045.
Monocacy Iron & Steel Co., Laws of 1873, No. 984, p. 922.
Collins Mineral Land & Mining Co., Laws of 1873, No. 1053, p. 986.
Harrison Land Co., Laws of 1873, No. 1047, p. 981.
Central Pa. Mining Co., Laws of 1873, No. 1034, p. 968.
Shamokin Coal Co.,[1] Laws of 1835–6, No. 179, § 13.
Summit Coal Co.,[1] Laws of 1835–6, No. 46, § 1.
Buck Mountain Coal Co.,[1] Laws of 1835–6, No. 194, §12.
Susquehanna Coal Co.,[1] Laws of 1840, No. 220.
Bingham Mining & Lumbering Co.,[1] Laws of 1866, No. 390, p. 427.

[1] In these cases the charters expresely *forbade* the operation of railroads of any description.

APPENDIX I.

LIST OF MINING COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS, WITH SOME POWER TO CONSTRUCT RAILROADS (USUALLY OF A FEW MILES IN LENGTH AND CLEARLY INDICATED AS MERE LATERAL ROADS) BUT WITHOUT POWER OF CONDEMNING PRIVATE PROPERTY, SO THAT THE CONSTRUCTION OF A RAILROAD OF ANY CONSIDERALE LENGTH WAS IMPOSSIBLE.

Lick Run R. R. & Coal Co., Laws of 1828-9, No. 142, p. 222.
Northampton & Luzerne Coal Co., Laws of 1835–6, No. 181, p. 678, §8.
Buck Mountain Coal Co., Laws of 1836–7, No. 62.
Mountain Coal Co., Laws of 1836–7, No. 23, §14.
Arbon Coal Co., Laws of 1837–8, No. 66.
Dauphin & Susquehanna Coal Co., Laws of 1837–8, No. 87.
Tangascootack Improvement Co., Laws of 1851, No. 208.
Locust Mt. Coal & Iron Co., Laws of 1842, No. 83, §2, p. 240.
Pickering Mining Co., Laws of 1853, No. 423, p. 781.
North Branch Coal & Iron Co., Laws of 1842, No. 70, §4.
Staffordshire Coal & Iron Co., Laws of 1843, No. 154, p. 323.
Furnace Run Coal & Iron Co., Laws of 1844, No. 311, p. 475.
Columbia Coal & Iron Co., Laws of 1856, No. 634, p. 662.
Mountain Coal & Iron Co., Laws of 1857, No. 683, p. 645.
Shamokin & Bear Valley Coal Co., Laws of 1862, No. 17, p. 15.
Elk Hill Coal Co., Laws of 1863, No. 581, p. 597.
Anthracite Coal & Iron Co., Laws of 1864, No. 240, p. 301.
Black Diamond Coal & Iron Co., Laws of 1864, No. 833, p. 942.
Clinton Coal & Iron Co., Laws of 1864, No. 463, p. 528.
Honey Brook Coal Co., Laws of 1864, No. 489, p. 554.
Lackawanna Valley Coal Co., Laws of 1864, No. 499, p. 571.
Newport Coal Co., Laws of 1864, No. 834, p. 944.
Northern Coal & Iron Co., Laws of 1864, No. 525, p. 627.
Pennsylvania Middle Coal Field Coal & R. R. Co., Laws of 1864, No. 836, p. 948.
St. Mary's Coal Co., Laws of 1864, No. 827, p. 933.
Westmoreland Coal Co., Laws of 1864, No. 562, p. 664.
Wilkesbarre Coal & Iron Co., Laws of 1864, No. 832, p. 940.
Karthaus Iron, Coal & R. R. Co., Laws of 1865, No. 873, p. 905.

APPENDIX I—Continued.

Cambrian Mining Co., Laws of 1865, No. 291, p. 288.
Sugar Cabin Coal & Iron Co., Laws of 1866, No. 1110, p. 1218.
Pittsburg & Campbell's Run Coal R. R. Co., Laws of 1866, No. 1039, p. 1110.
Farmers Coal & Iron Co., Laws of 1867, No. 1391, p. 1494.
Glen Alden Coal Co., Laws of 1867, No. 1364, p. 1461, and No. 1264, p. 1333.
Haverhill Coal & Iron Co., Laws of 1867, No. 1313, p. 1402.
Mineral Spring Coal Co., Laws of 1867, No. 1312, p. 1400.
Pa. & Ohio Anthracite Coal & Transportation Co., Laws of 1868, No. 479, p. 517.
Shawnee Coal & Iron Co., Laws of 1868, No. 638, p. 688.
Hillside Coal & Iron Co., Laws of 1869, No. 1279, p. 1312.
North Coal Co., Laws of 1871, No. 1330, p. 1447.
Pittsburg Coal & Mining Co., Laws of 1871, No. 1361, p. 1487.
West Penn Coal Co., Laws of 1874, No. 231, p. 340.

APPENDIX J.

LIST OF MINING COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS, WITH POWER TO ENGAGE IN MINING AND TO OPERATE RAILROADS OF LESS THAN FIFTY MILES IN LENGTH, FROM THE COMPANY'S MINING LANDS TO SOME RAILROAD, CANAL, OR NAVIGABLE STREAM.[1]

1. MAXIMUM LENGTH FIXED AT 5 MILES OR LESS.

Quinn's Run R. R. & Coal Co., Laws of 1835–6, No. 179, §1, §6.

Howelton Coal Co., Laws of 1838–9, No. 160. (4 miles.)

Towando Railroad & Coal Co., Laws of 1841, No. 52. (2 miles.)

Shickshinny Creek Bridge & R. R. Co., Laws of 1841, No. 104, p. 254, §2. (4 miles.)

Bloomsburg R. R. & Iron Co., Laws of 1845, No. 286, p. 438. (About 1 mile.)

Butler Coal Co., Laws of 1853, No. 335.

Consolidated Coal Co., Laws of 1856, No. 277, p. 253.

Connecticut & Schuylkill Coal & Iron Co., Laws of 1858, No. 522, p. 571. (2 miles.)

Donegal Coal & Iron Co., Laws of 1862, No. 559, p. 608.

Shawmut Cannel Coal Co., Laws of 1861, No. 602, p. 644.

Elk Hill Coal Co., Laws of 1863, No. 581, p. 597. (4 miles.)

Shenango Valley Coal & Transportation Co., Laws of 1863, No. 619, p. 663.

Youghiogheny Coal Hollow Coal Co., Laws of 1863, No 149, p. 140.

Anthracite Coal & Iron Co., Laws of 1864, No. 240, p. 301.

Norwood Coal Co., Laws of 1864, No. 977, p. 1141.

Schuylkill Valley Iron Co., Laws of 1865, No. 895, p. 938. (3 miles.)

Blakely Coal & Iron Co., Laws of 1866, No. 1121, p. 1229.

Shenango Coal Co., Laws of 1866, No. 113, p. 130. (3 miles.)

Benzinger Coal & Iron Co., Laws of 1867, No. 1135, p. 1208. (About 1¼ miles.)

Edgehill Iron Co., Laws of 1867, No. 1083, p. 1147.

Northampton Iron Co., Laws of 1867, No. 975, p. 1045.

Luzerne Coal & Iron Co., Laws of 1868, No. 770, p. 828.

Bethelem Iron Co., Laws of 1868, No. 482, p. 523.

Miyuga Iron Co., Laws of 1868, No. 1139, p. 1237. (3 miles.)

[1] Exclusive of such companies as possessed no power of eminent domain and therefore are included in Appendix I supra.

APPENDIX J—Continued.

United States Iron Armor & Steel Mfg. Co., Laws of 1871, No. 1365, p. 1493.

Lehigh Crane Iron Co., Laws of 1872, No. 358, p. 388. (2 miles.)

Rockhill Iron & Coal Co., Laws of 1873, No. 1085, p. 1026. (3 miles.)

Deer Lodge Improvement Co., Laws of 1873, No. 1041, p. 974.

Hemlock Improvement Co., Laws of 1873, No. 1147, p. 1103.

Millerstown Iron Co., Laws of 1873, No. 1066, p. 1004.

2. MAXIMUM LENGTH FIXED AT 10 MILES OR LESS (BUT MORE THAN 5 MILES).

Larry's Creek R. R. & Coal Co., Laws of 1838–9, No. 167. (7 miles.)

Morris Run Coal Co., Laws of 1838–9, No. 141. (7 miles.)

Broad Mountain Imp. Co., Laws of 1854, No. 603, p. 610. (6 miles.)

Union Iron & Coal Co., Laws of 1854, No. 17. (6 miles.)

Enon Valley Coal Co., Laws of 1855, No. 552, p. 534. (6 miles.)

Pittsburg Coal Co., Laws of 1861, No. 732, p. 836.

Burnside Coal & Iron Co., Laws of 1864, No. 556, p. 657.

West Buck Mountain Coal & Iron Co., Laws of 1864, No. 606, p. 708. (9 miles.)

Cameron Coal Co., Laws of 1865, No. 399, p. 413. (9 miles.)

Indiana & Westmoreland Gas Coal Co., Laws of 1865, No. 869, p. 900. (7 miles.)

Nescopeck Coal Co., Laws of 1865, No. 621, p. 625. (8 miles.)

Nottingham Coal Co., Laws of 1865, No. 439, p. 450.

Valley Coal Company, Laws of 1865, No. 369, p. 374.

Mineral R. R. & Mining Co., Laws of 1865, No. 914, p. 959.

Granby Coal Co., Laws of 1867, No. 1176, p. 1245.

Keystone Coal & Mfg. Co., Laws of 1867, No. 1416, p. 1525. (7 miles.)

National Iron Co., Laws of 1867, No. 974, p. 1041.

Silver Brook Coal Co., Laws of 1868, No 1194, p. 1302.

Emaus Iron Co., Laws of 1870, No. 1068, p. 1162.

Lehigh Iron Co., Laws of 1870, No. 1272, p. 1403.

North Penn Iron Co., Laws of 1870, No. 1303, p. 1436.

York County Iron Co., Laws of 1870, No. 1262, p. 1392.

Pennsylvania Joint Lumber & Land Co., Laws of 1870, No. 473, p. 481.

Osceola Improvement Co., Laws of 1871, No. 1309, p. 1424. (6 miles.)

St. Charles Iron Co., Laws of 1871, No. 1378, p. 1511.

APPENDIX J—Continued.

Pittsburg & Norwood R. R. Co., Laws of 1872, No. 181, p. 180.

Dunbar Iron Co., Laws of 1872, No. 551, p. 601.

Union Iron, Coal & Mfg. Co., Laws of 1873, No. 1123, p. 1074.

3. MAXIMUM LENGTH FIXED AT 20 MILES OR LESS (BUT MORE THAN 10 MILES).

McKean & Elk Land & Improvement Co., Laws of 1856, No. 41, p. 27.

Buffalo Coal & Iron Co., Laws of 1857, Nos. 771 and 772, pp. 784, 785.

Fall Brook Coal Co., Laws of 1859, No. 716, p. 745. (15 miles.)

Sullivan County Coal Co., Laws of 1861, No. 716, p. 809.

Clinton Coal & Iron Co., Laws of 1864, No. 463, p. 528.

Central Coal Co., Laws of 1865, No. 225, p. 222. (15 miles.)

Western Coal Co., Laws of 1865, No. 885, p. 923. (15 miles.)

Clarion Land & Imp. Co., Laws of 1865, No. 909, p. 953.

Bloss Coal Mining & R. R. Co., Laws of 1866, No. 527, p. 550. (16 miles.)

Continental Iron & Coal Co., Laws of 1866, No. 1022, p. 1087.

Saucon Iron Co., Laws of 1867, No. 1150, p. 1221. (15 miles.)

Jefferson & Elk Coal Co., Laws of 1864, No. 824, p. 928.

Pittsburg & Connellsville Mining & Mfg. R. R. Co., Laws of 1866, No. 866, p. 878. (15 miles.)

Ernst Coal & Iron Co., Laws of 1867, No. 1271, p. 1353.

Western Anthracite R. R. & Coal Co., Laws of 1869, No. 217, p. 238.

Lamont Mining & R. R. Co., Laws of 1870, No. 235, p. 245. (15 miles.)

Fairchance Iron Co., Laws of 1871, No. 216, p. 225. (15 miles.)

Highland Improvement & R. R. Co., Laws of 1873, No. 1096, p. 1045.

Somerset Land Co., Laws of 1873, No. 985, p. 924, and No. 995, p. 934. (15 miles.)

4. MAXIMUM LENGTH MORE THAN 20 MILES.

Paros Coal Mining & Lumber Co., Laws of 1867, No. 834, p. 913 (24 miles).

Glenwood Coal Co., Laws of 1870, No. 1221, p. 1350, and No. 1226, p. 1356 (30 miles).

Pennsylvania Cannel Coal & R. R. Co., Laws of 1865, No. 368, p. 373. (25 miles.)

APPENDIX K.

LIST OF MINING COMPANIES INCORPORATED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACTS WITH POWER TO ENGAGE IN MINING AND ALSO TO OPERATE RAILROADS OF NO SPECIFIED MAXIMUM LENGTH, EXTENDING FROM THE COMPANIES' LANDS, RESPECTIVELY, TO SOME RAILROAD, CANAL, OR NAVIGABLE RIVER IN THE VICINITY, THE RAILROADS BEING INDICATED AS LATERAL ROADS BY THE TERMINI RATHER THAN BY A LIMITATION UPON THEIR MAXIMUM LENGTH.

Lackawanna & Susquehanna R. R. Co., Laws of 1825–6, ch. 31, p. 80.

Lycoming Navigation, R. R. & Coal Co., Laws of 1827–8, No. 122, p. 255.

Tioga R. R. & Coal Co., Laws of 1827–8, No. 139, p. 316.

Delaware & Susquehanna R. R. Co., Laws of 1829–30, No. 172, p. 323.

Dauphin & Susquehanna Coal Co., Laws of 1826–7, No. 96, p. 203.

Beaver Meadow R. R. & Coal Co., Laws of 1829–30, No. 194, p. 392.

Wallenpaupack Improvement Co., Laws of 1829–30, No. 189, p. 357.

Laurel Hill Coal Co., Laws of 1837–8, No. 37, §8.

Hazleton Coal Co., Laws of 1838–9, No. 25, p. 49.

Offerman R. R. & Mining Co., Laws of 1837–8, No. 56.

Pennsylvania Coal Co., Laws of 1837–8, No. 73, §14, §25.

Washington Coal Co., Laws of 1837–8, No. 73, §1, §12.

Plymouth Coal Co., Laws of 1837–8, No. 71.

Stafford Coal Co., Laws of 1837–8, No. 23.

Sugarloaf Coal Co., Laws of 1837–8, No. 70.

Wyoming Coal Co., Laws of 1837–8, No. 72, p. 422, Laws of 1838–9, No. 20, p. 44.

Allegheny Coal Co., Laws of 1838–9, No. 104.

Allegheny & Bald Eagle R. R. Coal & Iron Co., Laws of 1838–9, No. 124.

Union R. R. & Mining Co., Laws of 1838–9, No. 125.

Bear Valley Coal Co., Laws of 1838–9, No. 123.

Good Spring Creek Coal Co., Laws of 1838–9, No. 112.

Hanover Coal Co., Laws of 1838–9, No. 6.

Potosi Coal Co., Laws of 1838–9, No. 158.

Towando R. R. & Coal Co., Laws of 1838–9, No. 121.

Western Pennsylvania Coal Co., Laws of 1838–9, No. 110.

Bradford R. R. & Coal Co., Laws of 1840, No. 214.

Middlefield Coal Co., Laws of 1840, No. 216.

Fourth Mountain Coal & R. R. Co., Laws of 1841, No. 20.

APPENDIX K—Continued.

Diamond Coal Co., Laws of 1841, No. 44.
Black Creek Coal & Iron Co., Laws of 1841, No. 76.
Blossberg Coal Co., Laws of 1844, No. 213.
Hollidaysburg & B. R. R. & Mining Co., Laws of 1844, No. 137.
Wilkesbarre Coal Co., Laws of 1849, No. 129.
Pequa R. R. & Improvement Co., Laws of 1849, No. 120.
Chartiers Coal Co., Laws of 1850, No. 433, p. 939.
Little Sawmill Run R. R. Co., Laws of 1850, No. 466, p. 1034, and Laws of 1852, No. 93, §6.
Central Coal Co., Laws of 1851, No. 382, and Laws of 1853, No. 188, p. 272.
Darlington Cannel Coal R. R. Co., Laws of 1852, No. 88.
North Branch Coal & Iron Co., Laws of 1853, No. 174, p. 252, No. 380, §23, p. 684.
Short Mountain Coal Co., Laws of 1853, No. 421, p. 779.
Allegheny R. R. & Coal Co., Laws of 1854, No. 468, p. 466.
Rock Cabin Coal Co., Laws of 1854, No. 742; p. 849.
Hopewell Coal & Iron Co., Laws of 1855, No. 594, p. 614.
New York & Middle Coal Field R. R. & Coal Co., Laws of 1855, No. 420, p. 399.
Moshannon Coal & Iron Co., Laws of 1857, No. 741, p. 744.
Thomas Iron Co., Laws of 1857, No. 410 and No. 731, pp. 359, 728.
Buck Mountain Coal Co., Laws of 1858, No. 512, p. 558.
McKean Coal & Iron Co., Laws of 1858, No. 511, p. 557.
Clinton County Coal Co., Laws of 1854, No. 738, p. 838; Laws of 1860, No. 236, p. 241; Laws of 1859, No. 397, p. 405; Laws of 1863, No. 564, p. 577.
Powelton Coal & Iron Co., Laws of 1862, No. 532, p. 574.
Saucon R. R. & Mining Co., Laws of 1862, No. 551, p. 599.
Blair Iron & Coal Co., Laws of 1863, No. 184, p. 178.
McNeal Coal & Iron Co., Laws of 1864, No. 797, p. 898.
Mercer Iron & Coal Co., Laws of 1864, No. 951, p. 1110.
Spring Mountain Coal Co., Laws of 1864, No. 838, p. 936.
Forest Improvement Co., Laws of 1838–9, No. 122, p. 278; Laws of 1864, No. 554, p. 656.
Anthracite Coal & Iron Co., Laws of 1864, No. 240, p. 301, No. 431, p. 496.
Antis Coal & Iron Co., Laws of 1865, No. 400, p. 414.
Girty Run Coal Co., Laws of 1865, No. 367, p. 370.
Phillipsburg Coal, Iron & Oil Co., Laws of 1865, No. 321, p. 317.
Sullivan & Erie Coal & Iron Co., Laws of 1865, No. 611, p. 617.
Upper Lehigh Coal Co., Laws of 1865, No. 379, p. 389.
South Mountain Iron Co., Laws of 1865, No. 249, p. 245.

APPENDIX K—Continued.

Beech Creek Coal, Iron & Petroleum Co., Laws of 1866, No. 1093, p. 1190.
Madera Coal & Improvement Co., Laws of 1866, No. 1095, p. 1194.
Potter County Lumber, Coal & Petroleum Co., Laws of 1866, No. 1108, p. 1214.
Brady Coal & Oil Co., Laws of 1867, No. 1277, p. 1359.
Pittston R. R. & Coal Co., Laws of 1867, No. 1081, p. 1142.
Bradford County R. R. Co., Laws of 1867, No. 1398, p. 1504.
Caledonia Iron, Land & R. R. Co., Laws of 1867, No. 522, p. 542.
Wrightsville Iron Co., Laws of 1867, No. 701, p. 750.
McConnell Mineral Co., Laws of 1867, No. 236, p. 255, and No. 721, p. 775.
Neshannock R. R. Coal & Ore Co., Laws of 1868, No. 77, p. 120.
Karthaus Coal & Lumber Co., Laws of 1869, No. 731, p. 757.
Somerset & Clearfield Coal Co., Laws of 1869, No. 1281, p. 1314.
Mont Alto Iron Co., Laws of 1870, No. 897, p. 980.
Miramar Iron Co., Laws of 1870, No. 1307, p. 1440.
Elk Lick Coal, Lumber & Iron Co., Laws of 1871, No. 1317, p. 1432.
Wilcox & Howard Hill Imp. Co., Laws of 1871, No. 1371, p. 1501.
East Broad Top Coal & Iron Co., Laws of 1872, No. 1181, p. 1306.
Raven Run Coal & Iron Co., Laws of 1873, No. 1091, p. 1032.
Standard Coal Co., Laws of 1873, No. 1030, p. 965.
North-Western Mining & Transportation Co., Laws of 1873, No. 1042, p. 976.
Steuben Iron Co., Laws of 1874, No. 214, p. 323.

APPENDIX L.

LIST OF CORPORATIONS CHARTERED BY THE LEGISLATURE OF PENNSYLVANIA BY SPECIAL ACT, WITH POWER TO ENGAGE IN MINING AND TO OPERATE RAILROADS, WHOSE RAILROADS ARE NOT SHOWN ON THE FACE OF THE ACT TO BE MERE LATERAL ROADS (ALTHOUGH IN MOST CASES PROBABLY VERY SHORT AND PARTAKING OF THE NATURE OF LATERAL ROADS RATHER THAN ORDINARY COMMERCIAL RAILROADS).

Rock Cabin & T. R. R. Co., act of April 6, 1833, Laws of 1832-3, No. 81.

Huntingdon & Broad Top Mt. R. R. & Coal Co., Laws of 1853, No. 367, p. 614.

Towanda & Franklin R. R. Co., Laws of 1854, No. 726, p. 807; No. 234, p. 255.

East Broad Top R. R. & Coal Co., Laws of 1857, No. 769, p. 780.

Sherman's Valley & Broad Top R. R. Co., Laws of 1858, No. 530, p. 583.

Columbia Coal & Iron Co., Laws of 1858, No. 376, p. 338.

Offerman R. R. & Mining Co., Laws of 1857-8, No. 56.

Lehigh Coal & Navigation Co., Laws of 1836-7, No. 39; Laws of 1863, No. 105, p. 99; Laws of 1864, No. 10, p. 11.

Trevorton Coal & R. R. Co., Laws of 1856, No. 197, p. 169.

Jamestown & Franklin R. R. Co., Laws of 1863, No. 612, p. 653 (passed in 1862), and No. 574, p. 587 (passed in 1863).

Towanda R. R. Co., Laws of 1863, No. 104, p. 97.

Freeport & Shenango Valley R. R. & Coal Co., Laws of 1864, No. 841.

Bear Creek R. R. Co., Laws of 1865, No. 414, p. 429. (Empowered to purchase merchandise but not to mine.)

McKean R. R. & Navigation Co., Laws of 1865, No. 534, p. 550.

Millersburg & Rousch Gap R. R. Co., Laws of 1865, No. 882, p. 920.

Fall Brook Coal Co., Laws of 1865, No. 876, p. 910 (authorized to lease Tioga R. R. or railroads in State of New York).

Hawley Coal & Transportation Co., Laws of 1866, No. 880, p. 894.

Susquehanna & Hudson R. R. Co., Laws of 1866, No. 1047, p. 1131. (Empowered to purchase merchandise, but forbidden to mine.)

Danville, Hazleton & Wilkesbarre R. R. Co., Laws of 1867, No. 983, p. 1059; No. 1078, p. 1137.

APPENDIX L—Continued.

Central Trunk Ry. Co., Laws of 1868, No. 776, p. 837.

Muncy Creek R. R. Co., Laws of 1864, No. 819, p. 922; Laws of 1869, No. 1272, p. 1302; Laws of 1869, No. 1280, p. 1314; Laws of 1870, No. 854, p. 927.

Northern R. R. & Navigation Co., Laws of 1869, No. 1275, p. 1307.

Tylersburg R. R. & Coal Co., Laws of 1874, No. 218, p. 329.

Wayne County R. R. Co., Laws of 1874, No. 315, p. 427.

Turtle Creek Valley R. R. Co., Laws of 1874, No. 316, p. 428.

Delaware & Hudson Canal Co., Laws of 1870, No. 533, p. 554.

Farmers' & Miners' R. R. Co., Laws of 1870, No. 457, p. 466; No. 516, p. 537.

Warren & Jefferson R. R. & Coal Co., Laws of 1871, No. 1368, p. 1498.

Elk & McKean R. R. Co., Laws of 1871, No. 1362, p. 1490.

Shamokin Valley & Pottsville R. R. Co., Laws of 1871, No. 199, p. 195.

New Castle R. R. & Mining Co., Laws of 1872, No. 645, p. 690.

Pittsburg & Castle Shannon R. R. Co., Laws of 1872, No. 139, p. 142.

Delaware, Lackawanna & Western R. R. Co., Laws of 1855, No. 118, p. 110 (allowing 2,000 acres of coal land to be held).

Northern Coal & Iron Co., Laws of 1866, No. 990, p. 1028 (limit 60 miles).

APPENDIX M.

CONTRACT BETWEEN LEHIGH COAL COMPANY AND LEHIGH COAL SALES COMPANY AND CONTRACT BETWEEN DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY AND DELAWARE, LACKAWANNA AND WESTERN COAL COMPANY IN PARALLEL COLUMNS.[1]

CONTRACT IN LEHIGH VALLEY CASE (5 R. 55–56).

This contract, made and *entered into* the first *day of* March, in the year *nineteen hundred and* twelve, *between the* Lehigh Coal Company, a corporation *of* the State *of* Pennsylvania (*hereinafter called the* Mining Company), *party of the first part, and the* Lehigh Valley Coal Sales Company, a corporation of the State *of* New Jersey (*hereinafter called the* Sales Company), *party of the second part, witnesseth;*

Whereas the mining company is the owner and lessee of certain *coal lands* and collieries *situate at various points* in what is known as the anthracite region *in the State of Pennsylvania, and has been engaged both in mining the coal* from said lands and in preparing *and selling the same, and in like manner has sold large amounts of coal purchased by it in said State of* Pennsylvania;

And whereas, the mining company in order to suitably

CONTRACT IN D. L. & W. CASE (REC. IN D. L. & W., CASE 364–372).

This contract, entered into this *second day of* August, *nineteen hundred and nine, between the* Delaware, Lackawanna and Western Railroad Company, *hereinafter called the* "seller," *of the first part, and the* Delaware, Lackawanna and Western Coal Company, *hereinafter called the* "buyer," *of the second part, witnesseth;*

Whereas the seller *is the owner of coal lands situated at various points in* the counties *of* Luzerne and Lackawanna *in the State of Pennsylvania, and has been engaged both in mining the coal* therefrom *and* in transporting to market *and selling the same, and in like manner has so* transported and *sold large amounts of coal purchased by it in said state;*

And whereas the seller so to *sell its coal has constructed*

[1] Words common to both contracts are printed in italics.

APPENDIX M—Continued.

L. V. CONTRACT—contd.	D. L. & W. CONTRACT—contd.
handle, dispose of and sell its coal has constructed and leased storage plants, docks and trestles, and other structures at various points in different states, and has entered into various agency and sales contracts;	storage plants and trestles at various points in different states, and has entered into various sales agency contracts;
And whereas, the said mining company desires, within the State of Pennsylvania, to sell and dispose of all its coal;	And whereas to so market said coal most of the same must be transported in interstate commerce, so that it has become necessary for the seller in compliance with law to sell all of its coal within the State of Pennsylvania;
And whereas, the Sales Company is desirous, except as hereinafter provided, to enter into a contract to purchase, in the State of Pennsylvania, all of the Mining Company 's coal at the mines and collieries where the same is and shall be mined and prepared, in such way and manner as that, at said mines, and collieries it shall become the absolute owner thereof;	And whereas the buyer is desirous of contracting to so purchase all of the seller 's coal at its mines,
And whereas, in order that it may better transport the same, when it shall have become the owner thereof, to such points as it may see fit, it desires to become the lessee of the mining company, of various of its storage plants, docks, trestles, offices and other facilities, and assume its present selling agency and sales contracts;	To contract for the transportation of the same to market and to sell the same, and for such purpose to lease of the seller various of its storage plants, trestles, offices and other facilities, and assume its selling agency contracts;
Now, therefore, in consideration of the premises and of the sum of one dollar ($1) by	Now, therefore, in consideration of the premises and of the mutual covenants herein

APPENDIX M—Continued.

L. V. CONTRACT—contd.	D. L. & W. CONTRACT—contd.
each of the said parties unto the other in hand well and truly paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in further consideration of *the mutual covenants herein contained, it is agreed* by and between said parties *as follows*, to wit:	*contained, it is agreed as follows:*
First. The mining company *agrees to sell to the* sales company, *and the* sales company *agrees to buy of the* mining company, *all mined marketable coal wherever situated now owned by the* mining company *and either stored, held at various points, or in the course of transportation*, and on hand at midnight on the 29th day of February in the year 1912, *except such coal as the* mining company *shall elect to retain for its use in the conduct of its business* as hereinafter provided.	*First. The* seller *agrees to sell to the* buyer, *and the* buyer *agrees to buy of the* seller, *all mined, marketable coal wherever situated now owned by the* seller *and either stored, held at various points, or in the course of transportation, except such coal as the* seller *elects to retain for its use in the conduct of its business* as a common carrier.
The sales company *shall pay the* mining company *therefor in cash within thirty days* of *the date hereof as follows, namely:*	*The* buyer *shall pay the* seller *therefor in cash within thirty days* from *the date hereof as follows, viz.:*
For all the coal in transit at prices to include the full tariff charges of the transporting company *and of all other carriers whose charges have been* incurred or *paid by the* transporting company *for the transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein at prices prevailing for the month of* February, 1912.	*For all* of *the coal in transit at prices to include the full tariff charges of the* seller *and of all other carriers whose charges have been paid by the* seller *for the transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein at prices prevailing for the month of* July 1909;

APPENDIX M—Continued.

L. V. CONTRACT—contd.

For prepared sizes of *coal stored at points west and north of Buffalo, N. Y., the sum of five dollars* and seventy five cents ($5.75) *per gross ton.*

For prepared sizes of coal stored at Buffalo and at points east thereof, *the sum of four dollars ($4.00) per gross ton.*

For all sizes smaller than prepared sizes stored at all points, *not including that stored at or about the mines of the* mining company, *the sum of one dollar* and twenty five cents ($1.25) *per gross ton.*

There shall be an equitable adjustment between both parties hereto of the *taxes for the year* 1912 *assessed or to be assessed against such stored coal.*

The sales company *hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with the storage of said coal, and hereby assumes all risks and obligations in connection therewith from the beginning of the day of date hereof.*

Second. The mining company *shall lease* and sublet to the sales company *contemporaneously herewith,* at a fair rental and with provisions in the lease that the sales company *shall keep the said properties insured and in repair* and with *such other covenants* and provisions *as may be proper to protect the interests of*

D. L. & W. CONTRACT—contd.

For all *coal stored* of all sizes *at points west and north of Buffalo, N. Y., the sum of five dollars* and fifty cents ($5.50) per gross ton;

For prepared sizes of coal stored at Buffalo and at other *points* along the lines of the owned, leased and controlled lines of the seller, *the sum of four dollars ($4.00) per gross ton;*

For sizes smaller than prepared sizes so *stored* at Buffalo and points east along the lines of the seller *not including that stored at or about the mines of the* seller, *the sum of one dollar* ($1.00) *per gross ton.*

The buyer shall also pay an equitable proportion of *taxes for the year* 1909 *assessed or to be assessed against such stored coal.*

The buyer *hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with* the transportation or *storage of said coal and hereby assumes all risks and obligations in connection therewith from the beginning of the day of the date hereof.*

Second. The seller *shall lease to the* buyer *contemporaneously herewith the following properties* (here follows description), the rental to be paid the seller by the buyer for the use of said properties shall be five per cent of their agreed value including good will, and the leases shall provide that the buyer shall *keep*

APPENDIX M—Continued.

L. V. CONTRACT—contd.

the mining company, *the following properties* (here follows description).

The mining company *has leased certain* facilities, structures, and *trestles*, which it owns, and has sublet certain like facilities, structures, and trestles, which it holds under lease *to different persons as follows* (here follow descriptions).

Such of these properties as the mining company owns, it agrees to assign its rights as lessor in the leases therefor to the sales company for the life of this contract and subject thereto. Such of its properties as it holds as lessee the mining company agrees to sublet to the sales company its rights as lessee therein and as lessor to other persons for and during the life of such leases, not to extend beyond the life of this contract, and subject thereto. For these properties the sales company shall pay the mining company the same fair rental provided for the other class of properties hereinbefore enumerated, and with like covenants as provided therefor. The mining company agrees to use its best endeavors to secure a renewal to it as lessee of all the said leases in which it is now the lessee that may be terminated during the life of this contract on as favorable terms as possible. The sales

D. L. & W. CONTRACT—contd.

the said properties insured and in repair, and shall contain such other covenants as may be proper to protect the interests of the seller.

The seller *has leased certain* of its *trestles to different persons as follows* (here follow descriptions) and various other trestles located on the lines of its owned, leased and controlled lines.

All of such leases * * * shall be taken over by the buyer as of the date hereof on terms to be agreed upon, and it shall assume all obligations of the seller with respect thereto, and be entitled to the benefits thereof.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

company agrees to become the sublessee of all such leases and to assume the obligations thereof and all the covenants to be kept and performed by the lessees thereunder.

It is further agreed as to such properties as are now held by various persons as tenants or sublessees in case of the termination of such tenancy the sales company shall have the right to substitute other persons in their places and to make subleases with such other persons for such length of time as it may desire within the term and period of this contract and subject thereto, provided, however, that the written consent of the mining company is first had and obtained.

The mining company *has entered into* various *agency* and *sales contracts*, which appear in Schedule A, hereto attached, and *all such contracts shall be* assigned by it to the sales company and be *taken over by the* sales company *as of the date hereof* for the term of such contracts, not to extend, however, beyond the life of this contract and subject thereto. The sales company shall *assume all obligations of the* mining company *with respect thereto and be entitled to the benefits thereof.*

D. L. & W. CONTRACT—contd.

The seller *has* also *entered into sales agency contracts* as follows (enumerating them). *All* of *such* * * sales agency *contracts shall be taken over by the* buyer *as of the date hereof on terms to be agreed upon*, and it shall *assume all obligations of the* seller *with respect thereto and be entitled to the benefits thereof.*

The seller has also entered into contracts for the sale of coal for the current year with various customers. A schedule of such contracts shall be prepared and furnished to the buyer by the seller. All of such sales contracts shall be assumed by the buyer as of the date hereof, and it agrees to comply with the terms and conditions of such contracts.

L. V. CONTRACT—contd.

Third. The mining company agrees to assign and does hereby assign, transfer, and set over to the sales company all accounts payable for coal sold as they appear upon the books of the mining company, and the sales company hereby agrees to pay to the mining company therefor forthwith. The mining company hereby guarantees the collection thereof so far as they appear on the date of this contract, the guaranty not to cover interest thereon.

Fourth. Whenever in the opinion of the sales company it may become necessary to have additional facilities provided for the transaction of its business, such as storage plants, shipping trestles, docks and retail trestles, or any other structure having to do with the physical handling of the coal, the mining company upon being notified of such necessity may have the same constructed at its, the mining company's, own proper cost and expense, and thereafter it agrees to lease the said facilities unto the sales company and the sales company agrees to enter into lease therefor; the rental to be a sum equal to 4½ per cent net of the cost of such additional facilities. If the mining company does not proceed upon notice as aforesaid to have the said additional facilities constructed, then the sales company shall have the right to

D. L. & W. CONTRACT—contd.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

have the same constructed at its, the sales company's, own expense, and such construction so provided by the sales company shall thereafter be the property of the sales company; it is agreed, however, that the mining company shall at any time have the right to purchase and acquire such additional facilities constructed by said sales company upon one month's notice in writing given to said sales company for that purpose, and unless the parties can agree upon the value thereof the same shall be referred to arbitrators under the arbitration clause hereinafter set forth. In such event the sales company agrees to at once lease the same from the mining company for the term of this contract, and subject thereto, the rental therefor to be 4½ per cent net of the value of such additional facilities.

In case the sales company finds it necessary to improve or enlarge the facilities now or hereafter leased to it by the mining company for the transaction of its business, such as storage plants, shipping trestles, docks, and retail trestles, or any other structure leased to it by the mining company and having to do with the physical handling of the coal, or to erect new structures of any kind on such leased premises, the said mining company may, upon being notified of the necessity therefor, make such im-

D. L. & W. CONTRACT—contd.

L. V. CONTRACT—contd.

provements and enlargements or new structures at its own cost and expense, and thereafter an addition to the rentals provided for in such lease or leases shall be paid by the sales company that shall equitably represent the value of the property thus improved or enlarged, the sum to be paid as rental to be 4½ per cent net of such value. This is not to apply to ordinary repairs and renewals that are to be made by and at the expense of the sales company. If the mining company does not proceed, upon notice as aforesaid, to provide for such enlargements and improvements, then the sales company shall have the right to make the same, provided, however, that thereafter such improvements and enlargements shall be and become the property of the mining company.

Fifth. *Subject to the conditions* and reservations hereinafter stated *and at the prices hereinafter* named, *the* mining company *agrees during the term of this contract to sell to the* sales company *all coal hereafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase.*

The sales company *agrees to purchase* and take *all such coal* at the *prices* hereinafter named *and to pay* the mining company *therefor in cash* in

D. L. & W. CONTRACT—contd.

Third. *Subject to the conditions* of this paragraph and *at the prices herein* stated, *the* seller *agrees during the term of this contract to sell to the* buyer *all coal hereafter mined by it from all coal lands owned or leased by it together with all coal it may purchase.*

The buyer *agrees to purchase all such coal at* such *prices, and to pay* the seller *therefor in cash* on the twentieth of each month for *all*

APPENDIX M—Continued.

L. V. CONTRACT—contd.

the manner hereinafter provided for. *All coal* shall be *delivered* to the sales company by the mining company *f. o. b. cars at the mines* where the coal is mined and prepared.

Deliveries shall be made from time to time as called for by the sales company. The sales company shall give upon the 25th of each month notice of the quantity, as nearly as practicable, the sales company will require for the next month, and arrange to take the coal in as nearly equal daily or weekly quantities as the requirements of the market will permit. The sales company shall use its best efforts to give orders for deliveries which will enable the mining company to work its collieries as many days in each year as possible.

Sixth. The sales company agrees to use its best efforts to develop trade and increase its sales and widen its markets for the coal, and the mining company agrees to use its best efforts to increase its production and deliveries to the sales company of said coal, whether from its own mines or the coal it may purchase. The mining company, however, shall be subject to no liability in case of a failure

D. L. & W. CONTRACT—contd.

coal delivered by it to the seller *f. o. b. cars at the mines* during the preceding month.

The buyer also agrees on the 15th of each month to pay to the seller in cash all tariff charges of its owned, leased, and controlled lines, and all monies advanced by it to other carriers for the transportation of said coal during the preceding month.

The amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine; and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire.

The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the goodwill and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at

APPENDIX M—Continued.

L. V. CONTRACT—contd.

to supply the full demands of the sales company, if such demands shall be beyond the reasonable capacity of the mining company to produce or if the mining company shall be prevented, by reason of any strikes amongst its employees, or by reason of injury to its mines, breakers, works, buildings, fixtures, or facilities, or for other cause beyond its ability to control. If by reason of any strikes among the employees of the sales company, or by reason of injury to the works, buildings, fixtures, handling facilities, or other property of the sales company or any property of the railroad company or companies by which the coal is transported to markets, the sales company shall be unable to take the coal as herein agreed, the sales company shall not be liable for nonfulfillment of this agreement during the period of such disability, provided every reasonable effort be made by the sales company to remove such disability at the earliest practicable period. The purpose and intent of this contract is to insure all reasonable efforts on the part of the mining company to prepare and furnish to the sales company all the coal that it can reasonably arrange to deliver, either from its own mines or by purchase, and on the part of the sales company to give its undivided attention to developing and in-

D. L. & W. CONTRACT—contd.

the prices above quoted the entire business of the buyer will be conducted at a profit.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

creasing the sales of coal delivered to it in the future by the mining company such increase in quantity as it is hoped the mining company may be able to furnish and deliver.

So long as the Mining Company is ready and willing to deliver to Sales Company coal under this contract, sales company shall sell no other coal or fuels for itself or for any other persons outside of that which will require to be sold *to comply with the terms of the existing hereinbefore recited sales agency and other sales contracts of* Mining Company. In connection with its yards at certain places, and to conform to trade conditions, the sales company may, however, purchase, handle, and sell bituminous coal to such extent as is absolutely necessary in order to maintain and develop its trade in the coal covered by this contract, the bituminous coal, however, to be handled by the sales company not to exceed three hundred thousand (300,000) tons annually; and it is permitted to deal in bituminous coal only because of the necessity to handle certain quantities thereof in order to retain its customers for the coal covered by this contract. The sales company hereby agrees not to purchase, handle, and sell any larger quantity of bituminous coal than is absolutely essential to enable it to take care of its business, as above set forth.

D. L. & W. CONTRACT—contd.

The buyer agrees that, except to enable it *to comply with the terms of the existing hereinbefore recited sales agency and other sales contracts of* the seller, in the event of the failure of the seller to sell it coal, it will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation except with the written consent of the seller.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

The mining company *reserves the right to retain all coal required by it for its* own use, this to include the right to stock such quantity of coal of various sizes as it may deem desirable, anticipating suspensions or other interferences with mining operations, or for any other purpose it sees fit, among others, the necessary amount for the operations of its mines, maintenance and operations of its pumps, etc., as well as all coal which it may desire to retain *for the use* of the Lehigh Valley Railroad Company for the operation *of its owned, leased, and controlled lines in the conduct of its or their business as common carriers.*

It is understood and agreed that the mining company shall have the right to sell and dispose of at retail on its own account coal for the use and consumption of its employees. It may sell at retail to others in the immediate neighborhood of the mining company's collieries, provided that the coal so sold and disposed of shall not in any event be loaded in railroad cars but shall be hauled from the mining company's collieries by wagon.

And the mining company shall retain such coal as is necessary to fulfill its obligations with its lessors.

It is understood and agreed by the parties hereto that during the life of this con-

D. L. & W. CONTRACT—contd.

The seller *reserves the right to retain all coal required by it for the use of its owned, leased, and controlled lines in the conduct of their business as common carriers.*

Also such coal as it may desire to sell its employees at the breakers, the same not to be hauled in railroad cars.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

tract there may be times when it will be of advantage to the mining company, and not to the disadvantage of the sales company, that the mining company shall have the right to sell, lease, or exchange some of its coal properties or coal leases; and it is hereby agreed that as and when such occasion arises the mining company shall have the right to make such sales, leases, or exchanges. The true intent and meaning of this provision is that the mining company shall not exercise such right to sell, lease, or exchange in such manner, or to such extent, as to prevent or impair its ability to keep this agreement with the sales company, but shall only exercise such right in that behalf when the same shall not cause a substantial dimunition in deliveries to the sales company of coal mined or purchased by such mining company and hereby agreed to be delivered.

Seventh. *The* sales company *agrees to pay and the* mining company *agrees to accept the following prices for said coal* when prepared in accordance with the standard hereinafter set forth, and *delivered* to the sales company *f. o. b. railroad cars at the breakers* where the same is prepared:

For all sizes above pea coal a sum equal to sixty-five (65) per cent of the general average

D. L. & W. CONTRACT—contd.

The buyer *agrees to pay* the seller, *and* the seller *agrees to accept* from the buyer, *the following prices for said coal,* to be *delivered f. o. b. railroad cars at the* various *breakers* now located and hereafter constructed by the seller at its mines aforesaid.

For all sizes above pea coal, sixty-five (65) per cent of the general average free on board

APPENDIX M—Continued.

L. V. CONTRACT—contd.

free on board prices of said sizes received at tide points at or near New York, between Perth Amboy and Edgewater, computed as hereinafter provided.

For pea coal a sum equal to fifty (50) per cent of the general average f. o. b. prices for pea coal at said tide points at or near New York when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the mining company shall be increased one (1) per cent until the percentage paid for pea coal reaches sixty-five (65) per cent.

For buckwheat coal No. 1 a sum equal to forty (40) per cent of the general average f. o. b. price at said tide points at or near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the mining company shall be increased two (2) per cent until the said f. o. b. price reaches two dollars and fifty cents ($2.50), after which the proportionate price paid the mining company shall advance one (1) per cent for each ten (10) cents advance in the f. o. b. price above two dollars and fifty cents ($2.50) as in the case of pea coal above mentioned. Provided that nothing herein

D. L. & W. CONTRACT—contd.

prices of said sizes received at tide points at or near New York, between Perth Amboy and Edgewater.

For pea coal, fifty (50) per cent of the general average f. o. b. price for pea coal at said tide points at or near New York when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the seller shall be increased one (1) per cent until the percentage paid for pea coal reaches sixty-five (65) per cent.

For buckwheat coal No. 1, forty (40) per cent of the general average f. o. b. price at said tide points at or near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the seller shall be increased two (2) per cent until the said f. o. b. price reaches two dollars and fifty cents ($2.50), after which the proportionate price paid the seller shall advance one (1) per cent for each ten (10) cents advance in the f. o. b. price above two dollars and fifty cents ($2.50), as in the case of pea coal above mentioned. Provided that nothing herein contained shall oblige the buyer to

APPENDIX M—Continued.

L. V. CONTRACT—contd.

contained shall oblige the sales company to pay for buckwheat No. 1 coal a rate higher than for pea coal.

For all sizes smaller than buckwheat No. 1 the mining company shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

It is also agreed that if at any time, through changes of sizes of meshes of screens or of conditions of trade, the sizes smaller than buckwheat No. 1, as described herein, shall be marketable at tide at the same price as buckwheat No. 1, the scale of prices on a basis of forty (40) per cent, when the general average f. o. b. price at tide is two dollars ($2.00) per ton or less, shall be substituted for the flat price at mines herein provided for during the continuance of such conditions.

As to the coal mined by the mining company and only as to coal it mines and prepares, from the above-stated prices an allowance shall be made to the sales company with respect to all sizes for the first year of this contract of 7 per cent, for the second year 6 per cent, for the third year 5 per cent, for the fourth year 3 per cent, and for the fifth year 1 per cent.

D. L. & W. CONTRACT—contd.

pay for buckwheat No. 1 coal a rate higher than for pea coal.

For all sizes smaller than buckwheat No. 1, the seller shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

Eighth. The general average f. o. b. prices herein referred to shall be determined by a disinterested expert accountant satisfactory to both parties, to whom the sales company shall furnish not later than the eighth of each month a statement of the quantity of each size sold during the preceding month and the amount realized therefor by the sales company at tide on all sales of each size of coal from the respective regions; and the accountant each month shall make a true average price for each size sold at tide of all the coal from the same region, and the average price thus obtained shall be furnished by the accountant to the sales company and the mining company, by whom they shall be accepted.

It is understood that when the words f. o. b. price occur herein the actual f. o. b. price received is meant, without any deduction for commissions, demurrage, or other charges.

Ninth. Payments for coal shall be made monthly in cash. A partial payment of at least one dollar ($1.00) per ton shall be made on or before the twelfth (12th) of each month, and the balance on or before the twentieth(20th), for all coal delivered by the mining company under this contract during the preceding calendar month, provided, that if default shall be made by the sales company in any

D. L. & W. CONTRACT—contd.

In the event of dispute as to tidewater prices * * * it is agreed that all such differences shall be determined by arbitration by a board of arbitrators to consist, etc. (See arbitration clause set out below.)

Payment on the twentieth of each month for coal purchased during the preceding month shall be made at such prices.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

payment aforesaid, the mining company may, at its option, declare this contract forfeited by giving notice of such default for a period of at least ten (10) days, and of its intention to terminate this contract, unless payment shall be made in the meantime; but in case of a like default of payment in the next succeeding month this contract may be peremptorily terminated by the mining company without such notice. It is expressly understood and agreed by and between the parties hereto that no failure or failures on the part of the mining company to enforce the forfeiture herein provided for shall be held or deemed to be a waiver or estoppel to enforce a forfeiture upon the causes herein set forth and in the manner herein provided whenever and so often as a new cause of forfeiture shall arise.

Tenth. All coal delivered under this contract shall be subject in the first instance to inspection under the direction of a chief inspector to be appointed by the mining company, whose duty it shall be to see that the said coal, as well as all other coal coming under his jurisdiction, conforms to the following standard except where meshes of a different size are provided for in existing leases to said mining company, viz: (here follow elaborate provisions as to the preparation of the various sizes).

D. L. & W. CONTRACT—contd.

Fourth. The seller agrees that all its coal sold to the buyer shall be properly prepared for market in accordance with the past practice and standards of the seller.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

The sales company shall have the right to appoint an inspector or inspectors, who shall be afforded every facility for inspecting said coal to ascertain if its preparation is in accord with the standard herein provided for, and if said sales company's inspector shall decide that any particular coal is not in accordance with said standard of preparation he shall immediately take the matter up with the mining company's chief inspector in that district. The sales company shall have the right to decline to take such coal until said inspectors have agreed upon the matter, and upon their failure to agree, until the question has been decided by some disinterested and qualified third person, to be by them selected, whose decision shall be final. The cost and expense of such reference to be borne in equal parts by the parties hereto.

Eleventh. If the conditions of the trade shall at any time or times require a higher standard of preparation than as aforesaid the mining company shall prepare the coal so as to conform to such higher standard, provided that the mining company shall be reimbursed for any increased expense involved.

Twelfth. A ton of coal under this contract shall consist of twenty-two hundred

D. L. & W. CONTRACT—contd.

(No specific provisions, only general provisions for reference of disputes to arbitration, set forth.)

If by reason of changes in market conditions, tariff rates, or otherwise, modifications or changes in this contract should fairly be made, and the parties hereto cannot agree with respect to such modifications or changes * * * it is agreed that all such differences shall be determined by arbitration.

APPENDIX M—Continued.

L. V. CONTRACT—contd.

and forty (2240) pounds, and all coal delivered to the sales company by the mining company under this contract shall be weighed either upon the scales tested and approved by the sales company at the mines where the same is prepared and by weighmasters approved by the sales company or upon the weighing scales of the railway over which it passes on its way to market, and the amount of coal in each car shall be determined by the certificate of the weighmaster at said scales.

Thirteenth. The mining company will manifest the coal it delivers f. o. b. cars at its breakers to such points and parties as the sales company shall from time to time direct and furnish and send to the sales company and to the consignees named by the sales company and such other parties as the sales company may direct such notice of manifest and such notice relating to the coal shipped as the sales company may direct. As to the coal the mining company may purchase from other persons and deliver to the sales company a like understanding and agreement will be incorporated in such contracts of purchase, if made in the future as are now in all present contracts.

Fourteenth. The mining company is the vendee under certain coal-purchase contracts, so called. As to these,

D. L. & W. CONTRACT—contd.

APPENDIX B—Continued.

U. S. CONTRACT—Contd.

U. S. & P. CONTRACT—Contd.

the coal now or hereafter to be delivered to the mining company is to be delivered by the mining company to the sales company at the mines where the same is mined and prepared. The mining company shall direct that the coal delivered under these contracts shall be manifested to such points and parties as the sales company shall from time to time direct, and shall require the orders thereon to issue and send to the sales company and to the consignee as named by the sales company and [illegible] the mining company from and after this date, and for and during the term of this contract and subject thereto. In case of any modifications or changes in such contracts agreed to by the mining company and the sales company during the life of this contract, the sales company agrees to conform to such modifications and changes and to carry out the terms thereof so as to relieve the mining company from any liability therefor or in connection therewith. This is to include cost of inspection now provided for in such contracts.

APPENDIX A—Continued.

C. V. CONTRACT—Continued.

C. C. & W. CONTRACT—Continued.

Fifth. The buyer agrees that at any transfer station named to it by the seller it will transfer from car to car any coal which the seller desires to have transferred, at a price to be agreed upon. It is also understood that the parties hereto shall adjust the charges to be paid by the buyer to the seller for coal forwarded to and unloaded from barges or stocking piles, and with respect to other transportation charges to be subsequently covered by tariffs to be filed by the seller.

Sixth. In the event of any dispute as to the value of any [illegible] facilities constructed by the sale company which upon notice the mining company may have indicated its desire to purchase and acquire as provided in section Fourth, all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the sales company, one person by the mining company, and these two arbitrators shall select a third, and a decision of a majority of such board of arbitrators shall be final, bind-

Sixth. In the event of any dispute as to the value of any [illegible] facilities constructed by the seller which upon notice the buying company may have indicated its desire to purchase and acquire as provided in section Fourth, all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the general sales agent of the buyer, and one person selected by the President of the seller, and a third person to be selected by the then President of the Farmers Loan and Trust Company of the City of New York, and that the decision of a majority of such board of arbitration shall be final and binding upon the parties hereto.

APPENDIX "A" Continued.

C. C. CONTRACT—Contd. C. C. & C. CONTRACT—Contd.

ing, and conclusive upon the parties hereto; and with reference to this provision for arbitration it is hereby further agreed that either of the parties hereto may enter the same in the court of common pleas of any county in the Commonwealth of Pennsylvania in accordance with sections 1 to 7 of the act of General Assembly of the Commonwealth of Pennsylvania approved the seventh day of June, A. D. one thousand eight hundred and three-six entitled "An act relating to arbitration and awards," and the decision of the arbitrators appointed hereby and rendered upon the parties.

Eighth. Any changes or modifications in the terms, conditions, or covenants of this contract which may hereafter be agreed to may be made by written agreement, duly executed, provided the same be approved by a vote of both the parties hereto acting by a majority of their several boards of directors or managers.

Sixteenth. *This contract shall become effective on the day of the date hereof* and shall stand for the full term and period of ten years, subject to the right of forfeiture and con-

Ninth. *This contract shall become in effect on the beginning of the day of the date hereof.* Upon written notice by either party to the other prior to August 1st, 1910, of its in-

APPENDIX M—Continued.

L. V. CONTRACT—contd.

cellation as set forth in section ninth, provided, however, that either party shall have the right to abrogate and cancel the same at any time upon giving to the other six months' written notice under the seal of the company, attested by an executive officer, of its desire so to do, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

Seventeenth. This contract does not apply to the bituminous coal the mining company mines from its Snow Shoe properties, all of which coal is now sold to the Lehigh Valley Railroad Company for supply purposes.

In witness whereof the said *parties have executed this* agreement *in duplicate* under their respective corporate seals, attested by the signatures of their duly authorized executive officers, on *the day and year aforesaid.*

D. L. & W. CONTRACT—contd.

tention to cancel this contract, it shall expire at midnight on the 28th day of February, 1911. Should no such notice be served, the contract shall continue to be operative until the expiration of six months after either party shall notify the other in writing of its intention to cancel the contract, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

Upon the expiration of this contract, the buyer agrees to sell to the seller or to whomever the seller shall nominate, and it agrees to buy or cause to be bought, all coal then stored or in transit purchased of the seller by the buyer, at prices to be agreed upon; or in case the parties cannot agree, to be fixed by arbitration as herein provided.

In witness whereof, the parties hereto have executed this instrument *in duplicate the day and year aforesaid,* at the city of Hoboken, New Jersey.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, APPELLANT,
v.
LEHIGH VALLEY RAILROAD COMPANY ET AL. } No. 1.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ADDITIONAL BRIEF FOR THE UNITED STATES.

STATEMENT.

In view of the brief already on file and the full argument heretofore made in this case, this brief will only attempt to present a very condensed statement of the more prominent facts and points therein. The brief for the United States already presented is not intended to be in any way modified, and every position taken therein is relied on and again respectfully called to the attention of the court.

The suit is brought by the United States against the Lehigh Valley Railroad Company (styled hereinafter Railroad Company), the Lehigh Valley Coal Company (styled hereinafter Coal Company), the Lehigh Valley Coal Sales Company (styled hereinafter Sales Company), and a number of other defend-

ants who are either corporations, or individuals, charged with taking part in the illegal transactions complained of, to dissolve and set aside an illegal combination in restraint of interstate commerce created and maintained by said defendants, violating the Sherman Anti-Trust Act, as well as to prevent the shipment of coal mined under the authority of said Railroad Company, and in which it has an interest, in violation of the commodities clause of the Hepburn Act.

THE RAILROAD COMPANY.

The Railroad Company is a common carrier, reaching the anthracite coal fields of Pennsylvania. Its lines lead from said coal fields through Pennsylvania and New Jersey to tidewater at New York City and Perth Amboy, New Jersey; also northerly from said fields through central and western New York to Buffalo, New York. Said railroad owns directly a large acreage of coal lands in said fields. Prior to 1875 there were a large number of coal mining companies in this field served by said Railroad Company as a common carrier. Among them were Luzerne Coal & Iron Company and Green Land Company.

THE COAL COMPANY.

Shortly before 1875 said Railroad Company acquired the stock of said last-named companies, and in 1875 consolidated them, forming a new corporation—said Lehigh Valley Coal Company—becoming the owner of its entire capital stock, which it still owns. (5 Rec. 78, 100.) Since said time

said Coal Company has been entirely dominated by said Railroad Company, being, in effect, its coal department. The president of each company is the same person; their directories are interlocking. (2 Rec. 622–624, 645–647.)

This continued domination is assumed to exist by the district judge in the opinion in this case.

In 1875, when this Coal Company was so formed, there existed the following companies, mining coal in the anthracite field in which the Coal Company was operating, adjacent to said railway, and competing in interstate commerce at the several dates when their stocks were acquired, to wit:

Hazelton Coal Company, having 3,600 acres of coal land (organized by Railroad Company to take title to coal lands acquired in 1868). Its entire stock was conveyed by Railroad Company to Coal Company in 1905.

Westwood Coal Company: Its entire stock was acquired by Railroad Company prior to 1900 and in 1905 was merged into Hazelton Coal Company and turned over as above to the Coal Company.

Locust Mountain Coal & Iron Company: Stock acquired by degrees by Railroad Company between 1869 and 1908; assets, including 3,620 acres of coal lands, conveyed to Coal Company in 1911.

Delano Land Company: Organized by Railroad Company in 1872 to acquire "Delano lands" (coal), about 5,800 acres, on which 10 collieries were then in operation. Turned over in 1891 to said Coal Company.

Humboldt Coal Company: Entire capital stock sold to said Coal Company in 1891 by Railroad Company; afterwards dissolved and its anthracite lands conveyed to said Coal Company.

Wyoming Valley Coal Company: Entire stock acquired in 1885 by the Railroad Company and transferred in 1908 to said Coal Company and its operation and accounts merged with those of the Coal Company.

A. Pardee & Company owned five collieries: Was purchased on November 1, 1894, by said Railroad Company and transferred to said Coal Company.

J. C. Hayden & Company, lessees and operators of South Spring Mountain Collieries: Railroad Company acquired lease and mining equipment in 1894 and transferred it to said Coal Company.

Connell Coal Company: Railroad Company bought entire stock, $500,000, in 1901 for $900,000; sold it to Coal Company in 1905 for $412,000; corporation was dissolved July 1, 1905, and its lands conveyed to Coal Company.

Seneca Coal Company: Its stock bought in 1901 by Railroad Company for $1,000,000; sold in 1905 to Coal Company for $773,000. On July 1, 1905, it was dissolved and its lands conveyed to said Coal Company.

Mineral Spring Coal Company, 601.5 acres anthracite coal land: Railroad Company acquired entire capital stock in 1902. In 1904 its stock was transferred to Coal Company. Thereafter it was dissolved and its assets conveyed to the Coal Company.

Righter Coal Company owned about 200 acres anthracite land. It was first a partnership. In 1902 it became a corporation, the entire stock of which was sold to Railroad Company. In 1905 this stock was transferred to the Coal Company. The corporation was dissolved and its assets conveyed to the Coal Company.

Warriour Run Mining Company owned 191.6 acres anthracite land. Its entire stock was purchased by Railroad Company in 1904. Said stock was transferred to Coal Company July 1, 1905, and the corporation dissolved and its assets conveyed to the Coal Company.

Wyoming Coal & Land Company owned 184.5 acres anthracite land. The Railroad Company acquired its entire stock in 1905. On July 1, 1905, it transferred said stock to the Coal Company. The corporation was then dissolved and its assets conveyed to the Coal Company.

Stevens Coal Company was operating in interstate competition with the Coal Company on lands of Coal Company held on lease. In 1910 Coal Company bought out its works and lease.

Mill Creek Coal Company operated on lands leased from Coal Company and competed with it in interstate commerce. Lease expired January 1, 1910. Coal Company refused to renew pursuant to the policy it adopted of refusing to renew leases to tenants and of extinguishing same by purchase where possible. It purchased the Mill Creek Company plant.

Coxe Bros & Company (Inc.), a large competitive anthracite coal producer, owns in fee or on long lease about 36,490 acres in the anthracite-producing region. Its collieries are located along the Delaware, Susquehanna & Schuylkill Railroad, through which shipments could be made over the Pennsylvania, Philadelphia & Reading Railroads, and Central Railroad of New Jersey, as well as the Lehigh. On November 1, 1905, said Lehigh Valley Railroad Company purchased from the Coxe estate the entire capital stock of said Coxe Bros. & Company (Inc.). While the separate corporation is preserved, its officers and directors are also officers and directors of

At the time of acquiring the stock of Coxe Bros. & Company (Inc.) and the Delaware, Susquehanna & Schuylkill Railroad Company and the Lehigh Valley Coal Company by the Lehigh Valley Railroad Company, the tracks of the Lehigh Valley Railroad Company connecting with the Philadelphia & Reading and the Central of New Jersey Railroads have been abandoned or disused. (5 Rec. 131; 1 Rec. 353, 365, 370.)

It thus appears that the Coxe Bros. & Company (Inc.) and the Delaware, Susquehanna & Schuylkill Railroad Company and the Lehigh Valley Coal Company are wholly owned, through stock ownership, and their operations dominated by the Lehigh Valley Railroad Company; that the officers and directors of the Coxe Bros. & Company (Inc.) are officers and directors of said Coal Company; and that each of the other coal companies are either now controlled by stock ownership by said Lehigh Coal Company and their operations and output handled through the Coal Company, or the companies are now dissolved and their properties and assets conveyed to said Lehigh Valley Coal Company.

e Pennsylvania, Philadelphia & Reading, the Cen-
l Railroad of New Jersey, and the Lehigh Valley.
management has been absorbed by the latter and
e access of the other three roads has been practi-
ly excluded from the mines on it.

Moreover, the Lehigh Valley Coal Company, which
d thus absorbed and controlled so many of the
mpetitive concerns in this field, had made a thirty-
ar contract with G. B. Markle & Company, one of
e largest producers of anthracite on the Lehigh
lley Railroad, to act ostensibly as its exclusive
ling agent. The Coal Company, however, bears all
penses and losses. In fact, the management of the
tput has given the Coal Company as full control as
t had purchased the coal; and it is classed as pur-
ased coal by the Railroad Company. (1 Rec. 66.)
The Lehigh Valley Coal Company, Coxe Bros. &
mpany (Inc.), and G. B. Markle & Company are the
ee largest producers along the line of the Lehigh
lley Railroad Company. Competition between
e three is thus controlled by the Coal Company,
d it, in turn, by the Railroad Company.

In addition to this the Railroad Company, through
subsidiary coal companies, made with the inde-
ndent producers of anthracite along its lines a
ies of contracts to purchase their entire output,
e price for prepared sizes, since 1901, being about
per cent of contemporary prices f. o. b. New York
arbor. (2 Rec. 968–970; 1 Rec. 494, 495.)

These contracts were condemned by this court as
ling in unreasonable restraint of trade and tending

to monopoly. *United States* v. *Reading Co.*, 226 U. S. 324, 355–358.

These contracts were all taken over by the Sales Company, which became the successor in interest of said coal companies, under the complete domination of the Railroad Company.

ABSORPTION AND OPERATION OF COAL COMPANY BY RAILROAD COMPANY.

The testimony in this case shows that the Coal Company was originally organized as a coal department of the Railroad Company (Baird, 1 Rec. 29–30).

The stock of the Luzerne Company was bought by reason of a recommendation of a committee of the Railroad Company that it be done "to organize a coal department." The Railroad Company already owned the stock of the Green Land Company. It merged the two into the Lehigh Valley Coal Company, becoming the sole stockholder of the consolidated company (Baird, 1 Rec. 14, 27, 30).

It continues to own every share. (2 Rec. 665–671.) Directors have qualification shares issued in their names, but the certificates for such shares are indorsed with a blank transfer by such persons and redelivered at once to the Railroad Company, or, if subject to a mortgage, to the Trustees thereof. (Baird, Rec. 15–16; 3 Rec. 1145–1147.) Hence these directors are, as to the stock which qualifies them, figureheads, the Railroad Company, being its true owner, and are liable to be disqualified at any time by its exercise of the rights possessed under the

transfer in blank. All said stock is voted by proxies given to the Secretary of the Railroad Company. (Baird, 3 Rec. 1147.)

The Railroad Company and Coal Company have always had the same president. (2 Rec. 622, 645.)

Until after the amended petition was filed in *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, the officers and directors of the Coal Company were almost without exception officers and directors of the Railroad Company. At the present time three of the six directors of the Coal Company are directors or officers of the Railroad Company. With the president (also president of Railroad Company), who is a member of the board, they constitute a majority of the board of the Coal Company. (2 Rec. 622–624, 645–647.)

Since 1905 the officers and directors of Coxe Bros. & Company (Inc.) have been substantially the same persons as the officers and directors of the Coal Company. Four of its five directors are directors or officers of the Railroad Company. (2 Rec. 645–649.)

The properties owned by the Coal Company were either bought by the Railroad Company and transferred to the Coal Company, or the Railroad Company ostensibly advanced the money to the Coal Company. It is the ostensible creditor of the Coal Company to the extent of many millions, upon a part of which it collected no interest, and a low rate as to the rest.

When the various transactions and relations between the Coal Company and the Railroad Com-

pany are considered and taken together, it is quite evident that the relation of the Railroad Company is not merely the legitimate control of a majority stockholder, but is a control of the conduct of the business of the Coal Company, and a complete domination.

While it is true that stock ownership without more does not constitute one corporation the owner of an interest in the property of another corporation within the meaning of the commodities clause of the Hepburn Act, yet it creates a relationship between the two corporations which renders acts and conduct between the same very cogent evidence of such domination of management by the stockholding corporation as renders the corporation thus owned a mere department of the first company.

THE SALES COMPANY.

On January 9, 1912, the executive and finance committee of the Railroad Company, because of the suit brought by the Federal Government against the Railroad Company (220 U. S. 257), as stated in its resolution, requested the directors of the *Railroad Company* to bring to the attention of the Coal Company the expediency of making some arrangement by which the coal belonging to the Coal Company would be sold under contract, for a specified period, by a coal sales company whose shares of stock would not be owned either by the Railroad Company or by the Coal Company, and to request the Coal Company to consider the propriety of taking some

action in the matter of organizing such coal sales company (5 Rec. 41, 42, 93).

On January 11, 1912, the board of directors of said Railroad Company, pursuant to said resolution of said committee, itself adopted a resolution directing the president of the Railroad Company to inform the directors of the Coal Company that the Railroad Company's directors requested them to consider the propriety of organizing a coal sales company such as has been recommended by said executive and finance committee, and the propriety of entering into a contract, for a time and upon the terms to be agreed, with such coal sales company for the purchase and sale by the latter of the coal mined, purchased, and owned by the Coal Company; and that the board of directors of the Coal Company in causing the organization of such Sales Company and the making of a contract as suggested, be requested to authorize an offer of subscription to stock of such Sales Company, not to the Railroad Company, but pro rata to the common and preferred stockholders of said Railroad Company.

By further resolution the sum of $6,060,800 was appropriated and ordered distributed as a dividend on February 26, 1912, pro rata to all stockholders of the Railroad Company as recorded on its books at the close of business on January 19, 1912. (5 Rec. 42, 93.) A few minutes later, on the same day and at the same place, the directors of the Coal Company met and in pursuance of the plan of said committee of said Railroad Company adopted a resolution author-

izing the incorporation of the Lehigh Valley Coal Sales Company, granting the stockholders of the Railroad Company the privilege of subscribing to the stock of the Sales Company to the extent of ten per cent of their holdings of the Railroad Company stock. To each of the Railroad Company's stockholders was sent a blank power of attorney authorizing Drexel & Company (1) to subscribe for such stockholder for his proportionate share of stock of the Sales Company; (2) to receive the dividend due the subscriber from the Railroad Company; and (3) to use it to pay the subscription to the stock of the Sales Company. Said resolution further provided that no stockholder of the Railroad Company should subscribe at all except for the whole of his allotment. (5 Rec. 42, 43, 93.)

On January 19, 1912, said Sales Company was incorporated in New Jersey with an authorized capital stock of $10,000,000, of which $6,060,800 was issued immediately, the same being equal to 10 per cent of the capital stock of the Railroad Company. Over 3,000 Railroad Company stockholders subscribed to their allotments of shares of the Sales Company, and their 10 per cent dividend declared by the Railroad Company was used to pay their subscriptions. These Railroad Company stockholders so subscribing constituted a large majority thereof and therefore in both companies (5 Rec. 43, 93).

The Sales Company's first officers were chosen largely from the Coal Company's sales agency force. The first officers were: John W. Skeele, president;

George N. Wilson, vice president and secretary; William J. Burton, assistant secretary and treasurer; A. R. Kyle, assistant treasurer. The first directors were: John W. Skeele, Paul Moore, Thomas W. Lamont, William R. Evans, Francis L. Hine, Horatio G. Lloyd, and Lyman D. Smith. John W. Skeele resigned as vice president and general sales manager of Lehigh Coal Company to become president of the Coal Sales Company. G. N. Wilson had formerly been general auditor of both the Coal Company and Railroad Company. Mr. Skeele has since died, and Mr. Wilson has succeeded him as president and director of the Sales Company. Of the directors, William R. Evans (who has been also vice president and general manager of the Sales Company since Mr. Wilson's promotion) was, until March 1, 1912, assistant to the general sales agent of Coal Company; Lyman D. Smith is vice president of the Railroad Company; Paul Moore is a son of W. H. Moore, who is a director and the third largest stockholder in the Railroad Company. Nearly the entire force of sales agents of Lehigh Coal Company were taken over by Lehigh Coal Sales Company (5 Rec. 43).

The answer of the Sales Company admits that the first officers of the Sales Company are as stated above. (5 Rec. 123.)

While some of the answers deny that the shares of the Sales Company were intended for distribution among the shareholders of the Railroad Company, the brief of counsel for the Sales Company in this

court states as one of the reasons for the formation of said company:

> The character of the coal property was such as to make it impossible to divide the same in kind among the Railroad stockholders or the Coal Company stockholders, while the value of the coal lands was so great as to make it impracticable to find a purchaser in the ordinary course of trade. * * * The only reasonable plan, therefore, to adopt was to organize a corporation with which a contract could be made by the Coal Company and out of the cash received, or stock issued, to pay for or preserve the equity which the Coal Company's stockholder, the Railroad, and its shareholders, had in the coal. This is what was done. (Brief for Sales Company, p. 9.)

CONTRACT OF MARCH 1, 1912.

A contract was then entered into between the Coal and Sales Companies as of March 1, 1912, (1) for the purchase by the Sales Company as of March 1, 1912, of all coal wherever situated as well as coal that had been mined during February and that was in transit, at the prices stated in said contract; (2) to arrange a contract for the purchase by the Sales Company at the mines of all the product of the Coal Company, embracing all coal thereafter mined or purchased by the Coal Company except that retained for its own use, for the use of the Railroad Company, or for local retail purposes, at the price of 65 per cent of the current average tidewater prices for the larger sizes, and somewhat lower percentages in respect to smaller

sizes, with an allowance made to the Sales Company by the Coal Company as to coal which it mined and prepared, of 7 per cent for the first year of the contract, 6 per cent for the second, 5 per cent for the third, 3 per cent for the fourth, and 1 per cent for the fifth; (3) for taking over the carrying out by the Sales Company of purchase contracts then in force between the Coal Company and certain producers of anthracite, as stated in Schedule A attached to said contract; (4) to assume all liability and undertake the handling of coal under the contract between the Coal Company and G. B. Markle & Company; (5) to take over all uncompleted contracts of customers and all leases of the Coal Company of offices and facilities such as trestles, yards, docks, etc.; also for lease for various storage plants and other facilities mentioned in said contract.

SIMILARITY TO DELAWARE, LACKAWANNA & WESTERN RAILROAD CASE.

The contract was in almost every particular similar to the contract made between the Delaware, Lackawanna & Western Railroad and the Western Coal Company, which was its sales company, and which this court held to be a violation of the Sherman Anti-Trust Act, as well as the commodities clause of the Hepburn Act. (*United States* v. *D. L. & W. Co. et al.*, 238 U. S. 516; see contracts printed in parallel columns Appendix M, Brief for the United States in this case, pp. 180–203.)

The District Judge held in this case: "The differences suggested between this and the Lackawanna case (referring to 213 Fed. Rep. 240) seem to me wholly unsubstantial" (5 Rec. 228).

The material provisions of the Lackawanna contract are summarized in 238 U. S., page 530. Comparing it with the contract between the Coal Company and the Sales Company in this case, and treating the Coal Company as the coal department of the Railroad Company, there is no difference whatever in subdivisions (a) and (b). While the language is different as to subdivisions (c) and (d), the Government insists there is no substantial difference as to these clauses. As long as the Coal Company is ready and willing to deliver to the Sales Company under said contract the Sales Company is not to sell other coal or fuels for itself, or for any other person, except such as will be required to be sold to comply with the terms of certain specified sales agency and other sales contracts of the Coal Company without the Coal Company's consent (being the same exception contained in the D., L. & W. contract). The Coal Company reserves the right to retain all coal required by it for its own use, including the right to stock such quantity of coal of various sizes as it may deem desirable, anticipating suspension or other interferences with mining operations, *or for any other purposes it sees fit*, as well as all coal which it may desire to retain for the use of the Lehigh Valley Railroad Company's operation of its owned, leased, and controlled lines as common carriers. It is therefore quite evident that

the Coal Company can limit the amount of coal which can lawfully be demanded of it under the terms of this contract. The Sales Company is to use its best effort to develop the trade and widen the markets for the coal. The Sales Company is to assume and carry out the contracts for the delivery of coal made by the Coal Company. The Coal Company leased to the Sales Company all of its trestles, docks, shipping facilities at a "fair rental." Four and one-half per cent of their value is provided as the rental on additions. The contract may be terminated by either party on giving six months notice. The similarity to the Lackawanna contract is apparent.

The answers of defendants deny anthracite coal is an article of prime necessity. One of the reasons given for this denial is that it is competitive with bituminous coal. In paragraph 6 of this contract the Sales Company is prohibited from dealing in bituminous coal except to the extent absolutely necessary to enable it to maintain and develop its trade in the coal covered by said contract; the amount not to exceed 300,000 tons of bituminous coal, "and it is permitted to deal in bituminous coal only because of the neccessity to handle certain quantities thereof in order to retain the customers covered by this contract. The Sales Company agrees not to purchase, handle, and sell any larger quantity of bituminous coal than is absolutely essential to enable it to take care of the business as above set forth." The Sales Company also under this contract assumes all of the obliga-

tions of the Coal Company for any coal under other coal contracts without any limitation as to whether they are profitable or not.

It thus appears that the competition between independent mines of coal along the lines of the Lehigh Valley Railroad has been extinguished and the control of such output merged into the Railroad Company's coal department, the Coal Company, either by acquiring the property, by contract for purchase of entire output, or by exclusive sales agency in at least the following instances:

Delano Land Co.
Humboldt Land Co.
Wyoming Valley Coal Co.
J. C. Hayden Co.
Connell Coal Co.
Seneca Coal Co.
Mineral Springs Coal Co.
Warriour Run Mining Co.
Righter Coal Co.
Wyoming Coal & Land Co.
A. Pardee & Co.
Coxe Bros. & Co. (Inc.).
G. B. Markle Company.

This entire output is handled by the Sales Company in connection with other coal also acquired, as above shown, by said Sales Company, which thus carries on the purposes of this combination, and seeks by one act under such contract—a provision for sale at the mines—to take the above relations of these parties

and the handling of their coal out of the scope of the Federal statutes. The Sales Company thus becomes one of the parties to this suppression of competition and effecting of monopoly.

The Railroad Company also owns the entire stock of its creature and department, the Coal Company, and of Coxe Bros. & Company (Inc.), its chief competitor, thus destroying their competition, as corporations with rival interests.

It had also acquired and still owns the stock and thus controls the Delaware, Susquehanna & Schuylkill Railroad Company, and has abandoned its connection with competitive roads and changed its relation from a gathering road connecting a considerable coal tonnage also with other roads, competing with the Lehigh Railroad, to a road serving the Lehigh Railroad alone and giving it the advantage of it as part of its lines. (Gilroy, 1 Rec. 353, 354, 355, 360, 370.)

The purpose of the combinations was to secure exclusive control of the coal transported over its road for the Lehigh Valley Railroad Company, excluding railroad competition.

The court below so assumed this as a fact. (5 Rec. 230.)

The officials of the railroad so admitted. (1 Rec. 10, 432, 504–5.)

The annual reports evidence this purpose. (2 Rec. 609–610, 938, 942, 944, 946.)

The course of dealing as to buying coal under the 65 per cent contracts with the independents evi-

dences the purpose to unduly restrain interstate commerce in anthracite.

This was an illegal transaction and so held by this court. (*United States* v. *Reading Co. et al.*, 226 U. S. 324, 367.)

The purchase of many of these properties accomplished permanently what these 65 per cent contracts temporarily effected.

The effect of these transactions was that in 1913 the Railroad Company through the Coal Company, Coxe Brothers & Company, and the Sales Company, controlled 79.95 per cent of the total shipments of anthracite coal over its lines. (Gov't. Brief, p. 12.)

That this control was acquired by other than normal methods of industrial development, and by means wrongful in themselves, appears from the evidence relating to the excessive freight rates exacted from independent producers, and the rebates and other preferences and advantages granted to the Coal Company and other affiliated coal companies. (Gov't. Brief, pp. 13–68.)

It is evidenced by the purchase and merging into the Coal Company by the Railroad Company of the large number of plants competing with each other and with the Railroad Company and its Coal Company when both the Railroad Company and the Coal Company had plenty of coal lands to supply a growing business and such purchase was needed for the sole purpose of controlling the competitive supply and accumulating the coal adjacent to the railroad lines.

The relations between the Coal Company as a shipper and the railroad as a carrier should be most significant in appraising their conduct and determining what they intended by such conduct.

In determining whether a course of dealing was the means to effect an illegal restraint of trade the history of previous transactions, the relation of the course proposed to past conduct, is most significant. If the parties have entered upon the course of conduct under review to produce certain results which, as accomplished by other means, had been pronounced illegal *because the relations thus produced* tended to monopoly and undue restraint of trade, a different method *intended to take the place* of the former and to attain the same result, would seem to be open to the same objection of being an agreement, combination, or course of dealing in undue restraint of trade. Applying these principles in this case we find—

That the Lehigh Valley Railroad Company was itself the owner of all the stock and dominated the Lehigh Valley Coal Company; that it was using it to transport said coal and control its sale in interstate commerce; that it desired to retain the same dominion over that commerce, but to devise a plan by which its entire relation and that of the Coal Company might be held intrastate commerce by interposing the Sales Company and an ostensible sale to it, at the mines, of all coal, and thus to take the relationship out of the commodities clause of the Hepburn Act and out of the antitrust act.

The defense set up, denying that the coal was sold by the Coal Company in interstate commerce, clearly establishes this.

But the seller was not willing to make an unfettered sale to an independent buyer.

While recognizing that a subscription by the railroad to the stock of the Sales Company would not separate the companies sufficiently it, however, refused to open the subscription to the world. It confined it to the Railroad Company's stockholders and provided that a banking house in intimate relations with the Railroad Company would take the remaining shares. The Railroad Company by a dividend financed its shareholders subscribing for said new stock. The entire transaction was originated and carried out under direction of the Railroad Company and its officers.

The contract with the Sales Company shows that the so-called sale was only a step in the entire transaction, which as a whole was interstate commerce, by which it was sought to retain a control of the coal and its movements in the seller.

THE COMMODITIES CLAUSE.

The relation between the Railroad Company and the Coal Company being practically one concern was recognized, and an effort to avoid the consequences flowing therefrom was intended to be accomplished, while retaining by the new method the same control on commodity and commerce while in the

hands of this Sales Company, composed in the main of the same persons and being in effect only an agency.

The Sales Company occupied the same relation to the Railroad Company (and its coal department the Lehigh Coal Company) as did the Western Coal Company in the case of *United States* v. *Delaware, Lackawanna & Western Railroad Company*. The Coal Company has always been merely the coal department of the Railroad Company. Coxe Bros. & Company (Inc.) is equally dominated, not only by complete stock ownership but by the same management and control as is exercised over the Coal Company, and by the turning over of its product to the Coal Company under the 65 per cent contract above mentioned.

This entire output is handled. The effect of the contract between the Coal Company and the Sales Company to the commodities clause of the Hepburn Act and to leaving the coal so under the control of the Coal Company and the Railroad Company as to bring these transactions within the prohibition of its terms has been already discussed. It is insisted that under the decision of this court in the Lackawanna case (238 U. S. 516) it should be so held.

The District Court (Judge Hough) proceeds upon the assumption that the Coal Company had from its creation done as it was ordered to do by the Railroad Company, and under such direction had bought, leased, or otherwise acquired control of coal lands; the purpose of such acquisition on the part of the

Railroad Company being to get and firmly keep the business of carrying coal extracted from those lands, and he decided this case upon the express ground that the differences between it and the case of *United States* v. *Delaware, Lackawanna & Western Railway*, 213 Fed. 240, were wholly unsubstantial; that he would follow that decision.

That case having been reversed it would follow that the court below was in error, and unless the relations of the Sales Company to the Railroad Company and Coal Company differ substantially from the relations between the Sales Company and the other defendants in the Lackawanna case, the decision on appeal in that case (238 U. S. 516) would require a reversal of the decree of the district court in the case at bar.

For further discussion of these and all other questions the Government brief now on file is respectfully referred to.

CONCLUSION.

It is respectfully insisted that the decree below should be reversed.

A. MITCHELL PALMER,
Attorney General.
ALEX. C. KING,
Solicitor General.

SEPTEMBER, 1919.

○

[redacted]1

No. [redacted], OCTOBER TERM, 1920.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
Clerk

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

LEHIGH VALLEY RAILROAD COMPANY *et al.*,

Appellees.

MEMORANDUM ON BEHALF OF APPELLEE GIRARD TRUST COMPANY, AS TRUSTEE.

JOHN HAMPTON BARNES,
ELIHU ROOT, Jr.,
Counsel for GIRARD TRUST COMPANY,
as Trustee, Appellee.

[redacted] Printing Post Job Printing Office, Inc., 120 Nassau St., N. Y.

No. 363, October Term, 1918.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant,

vs.

LEHIGH VALLEY R. R. CO., *et al.*, Appellees,

MEMORANDUM ON BEHALF OF APPELLEE GIRARD TRUST COMPANY, AS TRUSTEE.

I.

The reason for making Girard Trust Company a defendant.

Girard Trust Company, as trustee for the holders of two series of bonds issued by the Lehigh Valley Railroad Company in 1903 and 1905, respectively, has received and holds in trust as security for the payment of such bonds, shares of stock in the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., New York and Middle Coal Field Railroad and Coal Company, and Delaware, Susquehanna and Schuylkill Railroad Company, all of which companies were also made parties defendant to this suit. The holding of these stocks as trustee is the only allegation in the petition of the Government which relates in any way to the Girard Trust Company (Pet., p. 9). The Government expressly

disavows any intention of charging the Girard Trust Company with participation in the alleged wrongful acts with which the other defendants are charged (Pet., p. 4). The Government asks that the Lehigh Valley Railroad Company be required to dispose of all of these stocks now held by the Girard Trust Company as trustee, and also prays that the Lehigh Valley Coal Company (one of the companies whose stock is thus held by the Girard Trust Company) be dissolved into a number of separate units. It is apparent that the Government conceives that by reason of the relief thus prayed for, the bondholders have an interest in the result of this litigation sufficient to warrant making their trustee a defendant.

II.

Summary of facts respecting the Lehigh Valley Railroad Company bond issues of 1903 and 1905.

The Girard Trust Company is trustee under two mortgages made by the Lehigh Valley Railroad Company—the General Consolidated Mortgage dated September 30, 1903, and the Collateral Trust Agreement dated November 1, 1905. Copies of these mortgages are annexed to the Girard Trust Company's answer as Exhibits A and B, respectively, and have been admitted in evidence by stipulation (3 Rec., 1140).

Under the General Consolidated Mortgage of 1903, $49,639,000 face amount of bonds have been certified by the trustee and delivered to the Railroad Company. Under the Collateral Trust Agreement of 1905, $12,000,000 face amount of bonds have been certified by the trustee and delivered to the Railroad Company (3 Rec., pp. 1991, 1995). It appears

from the record in this case that at the time of taking the testimony upon the subject (July 20, 1914), there were outstanding, in the hands of the public, $36,639,000 face amount of bonds issued under the General Consolidated Mortgage, and $10,731,000 face amount of bonds issued under the Collateral Trust Agreement; also that the Consolidated Mortgage bonds were distributed among 3026 different holders, and the Colleratal Trust bonds among 513 different holders (3 Rec., pp. 1141–42). The bonds were issued for value (3 Rec., p. 1142), and no question has been raised by the Government in any way affecting their validity or the *bona fides* of their present holders. All of the bonds of both issues were certified by the trustee and delivered to the Railroad Company long prior to the beginning of this suit (3 Rec., pp. 1992, 1995).

As trustee under the General Consolidated Mortgage, the Girard Trust Company holds as collateral security for the payment of the bonds issued thereunder, all of the capital stock of the Lehigh Valley Coal Company and a large majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company. All of this stock (except directors' shares) has been transferred into the name of the trustee; all of the stock certificates were delivered to the trustee on or before February, 1908, *i. e.*, long prior to the beginning of this suit (3 Rec., pp. 1989, 1990). While these shares of stock constitute only a part of the security for the Consolidated Mortgage bonds, their great intrinsic value has been clearly demonstrated by the Government.

As trustee under the Collateral Trust Agreement, the Girard Trust Company holds, as collateral security for the payment of the bonds issued thereunder, all of the capital stock of Coxe Brothers & Co., Inc., and all of the capital stock of The Delaware, Susquehanna and Schuylkill Railroad Company, which likewise (except for directors' shares), has been transferred into the name of the trustee.

The certificates for these shares of stock were delivered to the trustee in November, 1905, long prior to the beginning of this suit (3 Rec., pp. 1992, 1993). In the case of the Collateral Trust Agreement, these shares of stock *constitute the only security* for the payment of the bonds issued thereunder.

The value of these stocks, and hence their importance as security for the bonds, may be inferred from the fact that they were purchased by the Railroad Company from the Coxe Estate in 1905 for approximately $19,000,000 (2 Rec., 887; 3 Rec., 1394).

III.

The Court should protect the bondholders, who are bona fide purchasers for value.

The Government asserts that by reason of the intent with which the stocks pledged with the Girard Trust Company have been acquired, the preferences accorded these companies, and other alleged illegal practices indulged in by the Railroad Company, the continued ownership of these stocks by the Railroad Company constitutes a violation of the Sherman Act, and asks this Court to require the Railroad Company to dispose of them "to persons not its stockholders or agents or otherwise under its control or influence." The Goverment also charges that one of these companies, the Lehigh Valley Coal Company, is itself existing in violation of the Sherman Act, and asks that such company be dissolved. The Government is, therefore, seeking to secure a forced sale of the collateral upon which the bondholders rely as security for the payment of their bonds, and a summary dissolution of one company whose stock is held as such collateral.

The thirty-five hundred purchasers holding the

bonds under discussion bought them for value and in good faith. It is not claimed by the Government that these bonds were sold after the institution of the present suit or after the making of any charge by the Government that the holdings of the Lehigh Valley Railroad Company were in violation of the Sherman Act.

Nor could these purchasers, even by painstaking inquiry, have discovered the existence of the alleged acts now relied upon by the Government to support the charges of its petition. Cash advances, waiving of interest charges, extension of credit, and other preferences alleged to have been accorded by the Railroad Company to the Coal Company; the existence of leases of coal lands, coal storage plants and coal yards containing covenants and restrictions alleged to be illegal; the alleged refusal of the Railroad Company to make joint rates from collieries located on other roads; the prevalence of high prices for anthracite coal at non-competitive points on the Lehigh Valley Railroad;—all of these alleged acts and conditions, as well as the other practices relied upon by the Government as evidence of a combination and conspiracy in restraint of trade—are matters which would of necessity have eluded the most diligent investigation by a prospective purchaser of these bonds.

Nevertheless the Government is apparently asking this Court to wrest from the lien of the General Consolidated Mortgage, under which upwards of $36,000,000 of bonds are outstanding, a substantial portion of the security for these bonds and to compel this security to be sold in a restricted market—conditions which will inevitably result in a sale for a mere fraction of its actual value. The Government is also asking this Court to wrest from the lien of the Collateral Trust Agreement under which upwards of $10,000,000 of bonds are outstanding, *all of the security* for these bonds, and to compel its sale in a market likewise restricted.

The Girard Trust Company, as the only representative in this proceeding of these bondholders, feels itself bound in their behalf to oppose the petition of the Government in so far as it affects the stocks held by it as collateral security for the payment of these bonds. Any decree of the Court should preserve unimpaired the lien of the Girard Trust Company as trustee on the stocks pledged with it as security for these bonds.

It has been the intention of the Girard Trust Company in this memorandum to present clearly to the Court its position as trustee for the bondholders whose security is threatened. The Girard Trust Company has no direct concern with the issues involved in this action save as they relate to the Railroad Company's continued ownership of the stocks pledged with it as trustee and to the continued existence of the Lehigh Valley Coal Company. With respect to these two issues we feel that it would serve no useful purpose for us to undertake an independent analysis of the evidence submitted *pro* and *con*, and that we may properly leave to counsel for the Railroad Company and the Coal Company the adequate presentation of all the facts and considerations tending to refute the charges of the Government. Moreover, we earnestly submit that whatever the facts may be upon these two issues as between the Government on one side and the Railroad Company and the Coal Company on the other, the existence of bondholders purchasing for value and in good faith creates a situation which demands that no decree be entered which will in any way impair the value of their security.

Respectfully submitted,

JOHN HAMPTON BARNES,
ELIHU ROOT, JR.,
Counsel for Girard Trust Company as Trustee,
Appellee.

Office Supreme Court, U. S.
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No. 6[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA,
Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY and others.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR G. B. MARKLE COMPANY

E. V. B. GETTY,
Solicitor for G. B. Markle Company.

Edward Carroll, Jr., Law Printer, 64 Church St., Manhattan.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 69.

THE UNITED STATES OF AMERICA,
Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY and others.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR G. B. MARKLE COMPANY.

Statement.

G. B. Markle Company is a corporation, the successor of G. B. Markle & Company, a co-partnership, miners and producers of anthracite coal in

the vicinity of Hazleton, Pennsylvania, and in the Lehigh region.

The partnership made a sales agency contract with the Lehigh Valley Coal Co., providing that the Coal Co. should act as selling agent for the output of their several mines, and this defendant is made a party in this action, and the petition charges that the above contract was made for the purpose of securing the Lehigh Valley Railroad, a monopoly in the transportation and sale of anthracite coal, produced along its line (R., 23).

The relief asked is that this defendant be adjudged to be in a combination and conspiracy in restraint of trade in violation of the Act of July 2nd, 1890 (26 U. S. Stat., 209), and that this defendant be enjoined from assisting in carrying out or maintaining this alleged conspiracy; that the contract be adjudged to have been made in furtherance of this combination and conspiracy; that the contract be cancelled and the further performance of it or any other similar agreement be enjoined (R., 47).

In all the voluminous charges of the petition there are no facts averred showing any combination or conspiracy to which G. B. Markle Co. is pretended to have any association with or even knowledge of other than this agency contract (Govt. Ex. No. 1 of the Record).

This defendant filed its answer, explicitly denying all averments attempting to associate it with any alleged combination, or conspiracy, with the other defendants, or that the purpose of the contract was any other or different than an ordinary agreement, entered into for lawful business purposes and claiming, that the contract in no way gave the Railroad Company any monopoly in transportation or prices, or any control whatever over

the transportation of the product of this defendant's mines or its sale in the markets which the G. B. Markle Company at all times dictates and controls.

I.

The Argument.

There are no facts in dispute as to this defendant, and the inferences sought to be drawn from the contract in question here, and the manner in which it has been carried out both by the Lehigh Valley Coal Co. prior to March 1st, 1912, and the Lehigh Valley Coal Sales Co. since that time, do not warrant any of the charges of the petition.

G. B. Markle Co. is the recent successor in corporate form of G. B. Markle & Company, a copartnership of many years' existence, holding anthracite lands near Hazleton, Luzerne County, Pennsylvania, and producing and marketing a considerable tonnage of anthracite coal. As long ago as 1877 this defendant made a sales agency contract with the Lehigh Valley Coal Co. to handle its coal. The reason for this is obvious. The Lehigh Valley Coal Co. had been in business merchandizing its large production of anthracite, had built up a large trade in parts of Pennsylvania and in the different States, had its agencies established, had a broad acquaintance with the trade, was in touch with dealers in anthracite in many places, and therefore could advantageously handle our coal (R., 1591). It was manifestly to our advantage to pay them a commission rather than to go into the market and incur the greater expense of organizing our own selling organization. We got

the benefit of their organization at a reasonable cost to us. The handling of this product did not interfere with disposing of the Lehigh Valley Coal Co.'s coal, as our coal was of a superior quality, was sold under separate trade names, and this defendant insisted always upon getting for its coal a higher price than the other coals were sold for.

On the 30th of March, 1889, the contract in question was executed between G. B. Markle & Co. and the Lehigh Valley Coal Co.

The contract in question on its face discloses no intention, and there is not the slightest proof in the record of any intention, to monopolize transportation or the sale of anthracite. The plain reading of it discloses this fact; it was perfectly legitimate, fair and mutually advantageous to the parties.

It was provided that for a period of thirty years from January 1st, 1890, namely, until January 1st, 1920, G. B. Markle & Co. undertook and agreed to mine and produce coal in such proportions as to sizes as might be demanded by the general condition of the market, and to consign for sale to the Lehigh Valley Coal Co. all the coal mined by G. B. Markle & Co.; and the Coal Co. agreed to receive the coal and to use its best endeavors to sell it.

The Coal Co. agreed to use its best endeavors to keep the collieries of this defendant supplied with orders from the various markets, and in order to give the collieries the full benefit of any reputation that they then had or thereafter might attain, the Coal Co. agreed that it would keep such coal as might be shipped by G. B. Markle & Co. under the agreement separate and apart and would designate it upon a circular price list by such name as the parties agreed upon.

The Lehigh Valley Coal Co. agreed to place on every order sent to G. B. Markle & Co. the price at the mines for each size of coal on such orders, this defendant having the right to accept or reject the price named in any such orders. The Coal Co. agreed to pay such tolls and freights "as may from time to time be demanded by the Lehigh Valley and other railroad companies upon coal shipped" by this defendant upon the orders of the Lehigh Valley Coal Co.

All shipments of this defendant upon the orders of the Coal Co. were to be settled for monthly at the prices marked upon the orders less commissions of twelve and one-half cents per ton.

It was agreed that if the market at any time assumed such position that the product of this defendant could not be sold at the prices fixed and established by G. B. Markle & Co., the Coal Co. might demand that this defendant and this defendant agreed that it would curtail the output from the collieries in such a manner as might be rendered necessary by the condition of the market, provided it should not be asked to curtail except in proportion with miners of similar coal.

This contract was not made for the purpose of monopolizing the transportation and sale of anthracite coal produced along the lines of the railroad. "No such thought was ever in our minds" (R., 2590). The lease of the properties from which the coal was produced covered by the old contract of 1877 was due to expire in 1889, and the present contract was entered into to take its place. It was similar in nature to the first contract with some modifications which we insisted upon as it was believed it was very much better for our business (R., 1591). The purpose of this contract was because we were mining coal and we wanted to have

somebody handle that coal and dispose of it (R., 1591). It was the belief of this defendant then and is now that the contract was of advantage to the Coal Co. in the handling of our products because they were able to dispose of a certain percentage of their own coal.

> "In other words, a great many purchasers of our coal could not get all they wanted and they would sell a certain portion of their production, allow them to have a certain portion of our coal and a certain portion of their own, which was to their advantage" (R., 1592).

There never were any preferences, discriminations, advances or advantages offered or conferred upon this defendant in any way whatsoever on account of this contract.

> "We have not a scratch of a pen as to a contract between the Lehigh Valley Railroad Co. and ourselves to ship one pound of coal over them" (R., 1592).

The president of this defendant added the following statement:

> "Can I add this statement, which to my mind was a condition that existed, and that is, this coal has all been sold at a premium above the price of other coal and naturally I consider it the best coal that goes to the market and sold to our customers or they would not buy it. * * * We have no contract of any nature whatsoever with the Lehigh Valley Railroad Co. and the only contract in existence for handling our coal is this contract with the Lehigh Valley Coal Co. and now handled by the Lehigh Valley Coal Sales Co." (R., 1593).

Coal of this defendant is sold along the lines of the Lehigh Valley at New York and Perth Amboy and in New England and in the Middle West. In fact we ship coal as far west as California. We name the price to the Lehigh Valley Coal Sales Co. on every ton that is sold and they cannot sell a ton of coal without our consent as to the price. We notify them promptly of what our prices are, subject to change at any time (R., 1595). We fix the price for the sale of our coal absolutely and the Sales Co. cannot sell it unless they accept that price (R., 1596). We require statements from our commission agents as to the prices received by them for our coal.

When the Lehigh Valley Coal Co. advised this defendant that it was going out of the business of handling and merchandising anthracite about the 1st of March, 1912, without formally abrogating this contract, this defendant tacitly accepted the Lehigh Valley Coal Sales Co. as its sales agent (R., 1600). They have been handling this defendant's coal ever since.

We ship a great deal of coal to Philadelphia. It goes over the Lehigh Railroad for a very short distance, then over the Reading Railroad or over the Pennsylvania Railroad (R., 1597).

As to the matter of transportation the Lehigh Valley Railroad is the initial carrier at the present time, as there is no other road right at the collieries (R., 1594). This defendant, however, has put in its own siding at its breaker, so that it is absolutely in a position if it so desires to order the coal shipped via any route or routes after an initial short haul over the Lehigh Valley Railroad (R., 1601).

There is nothing in the way to prevent this defendant selling all its coal at any place it might

desire and transporting it there for disposition. Every pound of it, for example, could be sold in Philadelphia. It would then be routed by either the Pennsylvania or the Reading (R., 1602). As things are at the present time Lehigh Valley Railroad would probably be the initial carrier as far as Tomhicken, where there is connection with the Pennsylvania, a very short distance from the collieries of this defendant (R., 1603). The clause in the contract as to restriction in the case the markets will not take coal of this defendant at the prices fixed by G. B. Markle & Co. has never been used and does not amount to "a hill of beans" (R., 1605). This defendant never restricted its output of coal nor did the Lehigh Valley Coal Co. ever ask it to restrict (R., 1606).

The evidence of Mr. Skeele taken in the first Reading case (put into this record), while he was acting as general sales agent of the Lehigh Coal Co., of Mr. Evans, the general sales agent of the Lehigh Coal Sales Co., confirms the statements herein as to the way this contract has been carried out ever since it was made.

This defendant is absolutely independent of the Lehigh Valley Railroad. It has recently joined with others in a complaint to the Interstate Commerce Commission because of the Railroad's publishing and putting into effect a demurrage tariff at Perth Amboy and because this defendant believes the freight rate from its collieries ought to be made to conform to the freight rate now in force from the Wyoming region to tide. This appears in the record.

There was no warrant in joining this defendant as a party in the petition in this case. Nothing was shown in the proofs to justify it.

II.

The decree dismissing the petition should be affirmed.

Respectfully submitted,

E. V. B. GETTY,
Counsel for G. B. Markle Co.

IN THE

Supreme Court of the United States

[redacted]

No. [redacted] 1916.

UNITED STATES OF AMERICA

vs.

LEHIGH VALLEY COAL SALES COMPANY, DEFENDANT WITH LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY, AND OTHERS.

BRIEF FOR LEHIGH VALLEY COAL SALES COMPANY.

NICHOLAS W. HACKER,
EVERETT WARREN,
Solicitors for LEHIGH VALLEY COAL SALES COMPANY.

[redacted]

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In the

Supreme Court of the United States,

No. 69 October Term, 1916.

The United States of America,
Appellant,

vs.

Lehigh Valley Coal Sales Company, impleaded with Lehigh Valley Railroad Company, Lehigh Valley Coal Company and others.

BRIEF FOR LEHIGH VALLEY COAL SALES CO.

This is an appeal by the United States from a decree of the District Court for the Southern District of New York, dismissing the Government's petition. The suit was instituted by petition filed March 18th, 1914, separate answers were filed by the Appellees; the case was determined by the Court (Hough, *D. J.*) upon the pleadings and proofs, consisting of the oral testimony and exhibits taken before an Examiner under an order of the Court.

I.

Preliminary statement as to the pleadings and issues.

The legal issues raised against this defendant are that it is a member of a combination and conspiracy to restrain and monopolize interstate trade in violation of the Act of Congress of July 2d, 1890 (26 Stat., 209) known as the Sherman Anti-Trust Law, and a party to the violation by the Lehigh Valley Railroad Company of a portion of Section 1 of the Act of Congress (24 Stat., 379) as amended June 29th, 1906 (34 Stat., 584) known as the Commodities Clause of the Hepburn Act. The acts which it is averred show the violation of these Federal Statutes have to do with the organization of the Lehigh Valley Coal Sales Company, the contracts by which it purchased from the Lehigh Valley Coal Company its stocked coal, took over its storage plants and facilities necessary to do the business of merchandizing large tonnages of coal, contracted to purchase the Coal Company's production of anthracite at the mines and undertook to carry out the Markle Sales Agency contract, to which the Coal Company was a party, and which had some years to run, and also taking assignments of contracts for the purchase of the output from certain operators—in force at that time.

The alleged *indicia* of the lack of good faith in these transactions, the assertions and arguments of the petition, without facts to support them, the illogical conclusions and *non sequiturs,* both of fact and law, and the charge that the contract between the defendant and the Lehigh Valley Coal Co. was

illegal are matters for consideration elsewhere in this brief.

All the charges affecting the *bona fides* of the inter-relations of Lehigh Valley Railroad Co., Lehigh Valley Coal Co. and this defendant, the integrity of its own organization and the lawful conduct of its affairs, as well as the charges as to its contract, are explicitly denied in its answer, to which reference is asked.

The relief asked in the 8th and 9th prayers of the Petition disclose the theory of the Counsel for the Government *as to its whole case against this defendant.* These prayers ask for an injunction against the transportation by the railroad of the Sales Company coal *"so long as stockholders of Lehigh Railroad constitute also the controlling stockholders of Lehigh Coal Sales Company".* Further, that the contract of March 1st, 1912, be declared in restraint of trade; that it be annulled, and that the parties be enjoined from entering into any similar arrangement *"so long as Lehigh Railroad or stockholders thereof are the controlling stockholders of either Lehigh Coal Co. or Lehigh Coal Sales Co."* (R., Vol. 5, 48).

Leaving out the alternative in the last prayer and eliminating all consideration of the exact situation as between the Railroad and the Coal Company, is it not clear that the gravamen of the complaint is the character of the stockholding? Is it not apparent the Counsel feel that the contracts are proper ones, the dealings since the organization of the Sales Company lawful if it were not for the stockholding situation? The Sales Company could enter into a "similar arrangement", that is to say, it could make precisely the same kind of a contract it did make March 1, 1912, with the Coal

Company, if its controlling stockholders were not the same persons as those holding a majority of the stock of the Railroad. All the charges affecting the propriety and legality of this defendant's transactions with the Coal Company and as a shipper on the Railroad hinge on the stockholding situation; in and of themselves they are proper and legal; it is only because of the way the stock is held they are bad. Is not this the fair inference from these prayers? If that is so the Government's whole case falls of its own weight, because it cannot seriously be contended, since *the Lackawanna case* (238 U. S. 516), that the stockholding situation in and of itself is illegal or violative of any law.

We are not to be held as conceding the fairness or propriety of the charges, insinuations and suspicions of the Petition (on the contrary they are not sustained in any particular in the proofs) but we submit that these prayers disclose the hollowness of the Government's case and the lack of any real basis for it to rest upon.

The scope of this brief may appear to be disproportionate to the narrow grounds which we believe are decisive of the controversy, but the endeavor has been not to slight any feature which the Counsel of the Government may ask to be considered.

II.

Statement of Facts.

1. An outline of matters leading up to the organization of the Sales Co., the securing of its charter, the making of the contracts with Coal Co. and its entry into business.

January 12, 1912, the Executive Committee of the Railroad, upon the recommendation of Mr. Johnson "*that it would be expedient even though not legally required* to make some arrangement by which the coal belonging to the Lehigh Valley Coal Co. would be sold, under a contract for a specified period, by a Sales Company whose shares of stock would not be owned either by the Railroad Company or by the Coal Company," (Pet., p. 66) resolved to ask the Directors of the Railroad Company to bring to the attention of the Coal Company (the word "Railroad" in the petition, page 67, line 5, being a misprint and should be "Coal") the recommendation which had been made with reference to the organization of a Sales Company and to request the Coal Company to consider the propriety of taking some action in the matter of organizing such a Sales Company, whose shares would thus be independently held. January 11, 1912, Directors of the Railroad passed a resolution asking the President to inform the Directors of the Coal Company that the Directors of the Railroad Company requested them to consider the propriety of organizing a Coal Sales Company such as has been recommended by the Executive and

Finance Committee of the Railroad Company (Pet., 67). It was further resolved that the Board of Directors of the Coal Company, if they determined to cause an organization of the Sales Company and make a contract with it as suggested, be requested to authorize an offer of a subscription to the stock of such Sales Company, *not to the Railroad Company* but *pro rata* to the common and preferred stockholders of the Railroad Co. At this same meeting an appropriation was made out of the accumulated surplus of the Railroad, by way of a dividend, of the sum of $6,060,800 to be distributed as a dividend on February 26, 1912, to the holders of the stock of the Railroad Company, as of January 19, 1912. The same day the Directors of the Coal Company met and passed a resolution authorizing the incorporation of a Sales Company, and granting stockholders of the Railroad the privilege of subscribing to the stock to the extent of 10 per cent. of their holdings in the Railroad. General notice was given of this action of the Railroad Company and the Coal Company in the financial journals, and a circular further was issued and sent to all stockholders of the Railroad, advising them of the declaration of a dividend, of the opportunity to subscribe for stock in the Sales Company, a charter for which had been secured under the laws of New Jersey at the instance of the Coal Company; and there was sent with the circular a blank power of attorney which, if executed, authorized Drexel & Company to subscribe on behalf of the stockholder for his proportionate share of the stock of the Sales Company, to receive the dividend due the subscriber from the Railroad, and to use the dividend to pay his subscription to the capital stock of the Sales Com-

pany, *or the stockholder could receive his dividend in cash*. The circular stated that all stock not subscribed for by railroad stockholders would be taken at par, by "an underwriting syndicate which had been organized by Drexel & Co. of Philadelphia to insure a full subscription to the capital stock" (R., 630); this syndicate also was not a money-making one and got no commissions (R., 1254). A 10 per cent. dividend was paid and a large majority of the stockholders of the Railroad availed themselves of the privilege of subscribing to the stock of the Sales Company.

The organization of the Sales Company was undertaken by Mr. John W. Skeele, at that time a Vice-President and the General Sales Agent of the Lehigh Valley Coal Company. He gathered around him a group of gentlemen to take charge of the business of the new enterprise, asking Mr. George N. Wilson, at that time General Auditor of the Railroad Company to retire from the Railroad. Mr. Wilson was afterward elected Vice-President and Secretary of the Sales Company. Mr. Skeele selected his Board of Directors; they were all gentlemen of probity and of good business standing. A charter was secured January 22d, 1912 (R., 2451), under the laws of the State of New Jersey, authorizing the Sales Co. to conduct the business of handling and merchandising coal.

At this time the Coal Company was handling and merchandizing upwards of eight millions of tons of anthracite, produced by it at its various collieries, and in addition thereto a small amount of coal from certain other producers in the region, under coal purchase contracts. It was also the Sales Agent for G. B. Markle Company under a contract having several years to run, made March 30, 1889, selling

this coal on a commission basis, all sales, the fixing of all prices and the handling of the Markle product being at all times under the daily supervision and absolute control and dictation of the G. B. Markle Company. The problem confronting the Coal Company therefore was a serious one. It had built up a business in handling and selling anthracite of over thirty millions of dollars a year; it had sales agencies and offices in a large number of the States and in Canada. It had on hand at about this time nearly half a million tons of coal in stock at thirty-nine different stocking points throughout the country (Govt. Ex. 109).

Many years before, the Lehigh Valley Railroad had constructed a mechanical storage plant at South Plainfield, N. J., and had leased it to the Coal Co. which was operating it. The Coal Co. had itself constructed other large stocking plants at Ransom, Hudsondale, Wende and at other places. These storage plants, while a burden and expense to any concern merchandizing anthracite, were a necessity to one handling so large a tonnage. The Coal Co. further had certain docks which it either owned or leased, and trestles and other facilities for handling its business and accommodating customers, both those along the line of the Lehigh Valley Railroad and on the lines of other railroads. The proposition was to arrange on a given date to dispose of all matters involving the Coal Co. in any interstate business and to enable it to confine its entire business to the production and sale of its product at its mines in Pennsylvania. It was determined shortly after the organization of the Sales Co. to accomplish all this by March 1st ensuing.

To enable the Lehigh Valley Coal Company to

get out of interstate business and at the same time not to sacrifice the equity of the shareholders of the Railroad, which owned the Coal Company stock, in the coal property, mines and mining improvements, there was but one way that seemed feasible. To shut down the mines would have meant not only vast monetary loss to the Coal Company and its stockholder, the Railroad, but would have been even more harmful to the interests of the public, which required a constant supply of fuel. The character of the coal property was such as to make it impossible to divide the same in kind among the Railroad stockholders or the Coal Company stockholders, while the value of the coal lands was so great as to make it impracticable to find a purchaser in the ordinary course of trade. The greater portion of the coal property was held under lease agreements, covenants in which prevented assignment and transfer to other persons. The only reasonable plan, therefore, to adopt was to organize a corporation with which a contract could be made by the Coal Company and out of the cash received or stock issued to pay for or preserve the equity which the Coal Company's stockholder, the Railroad, and its shareholders, had in the coal. This is what was done.

To accomplish all the things necessary to be done to insure equitable and fair treatment to the Coal Co. and to the Sales Co. there were a number of plans formulated, negotiations had as between the officials of the Coal Co. and the Sales Co., and ultimately the counsel of the respective companies were employed to draft contracts and leases to cover a large variety of things, viz.:

1. To take over and pay for, on some equitable basis, the bills and accounts receivable of the Coal

Co. as of March 1, 1912, that is to say, the money owing the Coal Co. for sales of Coal and otherwise.

2. To arrange a contract for the purchase by the Sales Co. at the mines of all the product of the Coal Co. under some form of contract that would be equitable, fair and protective to both parties.

3. To take over the carrying out of the coal purchase contracts then in force between the Coal Co. and certain producers of anthracite.

4. To provide for the handling of the Markle coal under the contract of 1889.

5. To provide for the purchase by the Sales Co. as of March 1st, 1912, of all coal wherever situate in storage plants, at a fair price, as well as coal that had been mined during February, and that was in transit.

6. To take over all uncompleted contracts with customers, all leases of offices and facilities such as trestles, yards, docks, etc.

7. To arrange for leasing the various storage plants and other facilities on a fair basis of rental.

Everything was approached with a firm purpose to accomplish all these things, not only in a way that would be equitable and fair to the stockholders of the Coal Co. and to the stockholders of the Sales Co., and to protect the interests of each of these companies, but also to obviate any possible criticism on the part of the Department of Justice at Washington as to the relations between these two companies after March 1, 1912; the determination being to submit all contracts to the Attorney General in the belief that it would result in his agreeing to a dismissal of the amended complaint (220 U. S. 257), and that thereafter there would be no further occasion for litigation as between the Gov-

ernment and either the Railroad or the Coal Co. or the Sales Co. in matters of transportation of anthracite, or as to any other of the inter-relations of the companies. Not a single share of the stock of the Sales Co. was either subscribed for or purchased by the Railroad Co. or by the Coal Co. *Not a single director of the Railroad Co. was chosen by Mr. Skeele as a Director of the Sales Co.* The only person associated with either the Railroad Co. or the Coal Co. in any way after March 1, 1912, who became identified with the Sales Co., was Mr. Lyman D. Smith, who was a director of the Coal Co., a Vice-President of the Railroad Co. (but not a director thereof) in charge of its finances and of the accounting department of the Coal Co.; the reason for his selection being that Mr. Skeele desired the benefit of his experience and judgment as to such matters. It was well understood by Mr. Skeele that the capital of the Sales Co. was a very small one upon which to undertake even to handle the business theretofore under his charge as the General Sales Agent of the Coal Co.

As it was naturally desired to further develop and enlarge the trade if possible, and as the monthly output of the Coal Co. was to be bought and paid for, whether markets would take it or not at all seasons of the year, it was vital to the new enterprise to secure if possible in the directorate gentlemen associated with some of the banking institutions to whom the Sales Co. would have to turn at times for loans. Mr. Francis L. Hine, President of the First National Bank of New York, was therefore asked to serve; Mr. Horatio G. Lloyd, of Drexel & Company, and Mr. Thomas W. Lamont, of J. P. Morgan & Co.; none of these gentlemen had

any association with the management of either the Coal Co. or the Railroad Co.

As a result of many conferences, the critical examination by independent experts of the values of the plants to determine a fair basis for rentals, the consideration of the opportunities for the further developing of the trade of the Sales Co. so as to insure to the Coal Co. a disposition of its product, the cost and expenses of developing new territory and making it satisfactory and remunerative with proper allowances to the Sales Co. during such efforts, the utilization of the basis of payment for coal that had been in vogue in the region for many years, to wit, a given per cent. of prices received for all anthracite coal going to tide water points, the contract of March 1, 1912, was finally agreed upon as to its terms; fair prices were agreed upon to be paid for the stocked coal, coal in transit, statements were ascertained from the books and verified as to bills and accounts receivable, contracts and leases were made, and on the 1st of March, 1912, Lehigh Valley Coal Co. ceased absolutely and entirely to have any relation or association with the merchandizing of anthracite coal other than at its mines in Pennsylvania, or the handling of anthracite coal, and gave up all and every variety of agencies everywhere, confining itself thereafter to the production of coal at its collieries in Pennsylvania and the sale and delivery there of its product.

The Sales Co. established itself in rented offices No. 99 West Street, New York City, applied for and secured under the rules the right to list its stock on the curb exchange in New York, and from that day to the present has confined itself exclusively to its own concerns, attending to its legitimate business affairs. Mr. Skeele continued as President un-

til his unfortunate death in the late summer following, and in September of that year Mr. George N. Wilson, the Vice-President of the Company, was elected as its chief executive.

All the matters associated with the organization of the Sales Co., the contracts and leases with the Coal Co., were promptly submitted to the Department of Justice and commented upon in the report of the Attorney-General for 1912 (R., 1268). He said:

> "The situation is, therefore, that coal which is shipped over the Lehigh Valley Railroad is mined by the Lehigh Valley Coal Company, all of whose stock is owned by the railroad company, and is sold at the breakers to the Lehigh Valley Coal Sales Company, all of whose stock has been originally issued to and distributed among the stockholders of the railroad company *pro rata*, but which company has separate officers from the railroad company, and separate directors, and whose stock may be sold by the stockholders without regard to their continued holding of stock in the railroad company. *By this arrangement both the railroad company and the coal companies seem to have parted in good faith with title to the coal before transportation begins*, and it is claimed, therefore, that transportation is free from the prohibition of the commodities clause as construed by the Supreme Court in 213 U. S. 412 (29 Sup. Ct. 527, 53 L. Ed. 836). The question will be submitted to the court at an early day." (Italics ours.)

2. The situation since the entry into business by the Sales Co.; its transactions with both the Coal Co. and the Railroad Co. and how carried on, and its other business affairs and how conducted.

As to the Railroad the Sales Co. is one of several shippers. It at all times has selected its own routing of its coal both that it purchases in Pennsylvania and that it handles on a commission basis. It directs the Agents of the Railroad from day to day how and where to ship its coal, whether to points in Pennsylvania or elsewhere. There is not the slightest evidence of any preference given the Lehigh Valley Railroad in a single shipment. Of course that Railroad is the initial carrier from the collieries, as to them it built its spur lines and branches many years ago, and it is not practicable generally owing to the manner of the construction of breakers to secure two or more Railroad entrances under the pockets and chutes. This, however, is only a matter of a few miles in most instances to junction points with connecting carriers, and such carriers have been freely used to reach desired markets and supply trade to whatever extent it has been developed.

There is no suggestion in the petition or the proofs that this defendant ever routed its coal over rails of Lehigh Valley because of an undue preference, or to a disadvantage to the points it desired the coal to move, or at a higher freight rate than by some other route, or in fact anything even squinting at undue monopoly of transportation. The Sales Co. at all times has paid the published tariffs to all points.

While the Sales Co. has paid large sums to the Railroad in freight, it has paid still more enormous sums to other railroads, shipping its coal into Canada, by the Great Lakes, by the roads entering Chicago and extending further West, Northwest and South, and into New England as well as throughout the Middle States; *its principal market not being New York where not more than 12 per cent. of its coal is sold and handled*, but in the West and North and interior points of the Middle States. It has been called upon to pay large sums as demurrage to the Lehigh Valley Railroad. It has had no discriminations in its favor over any other shipper; at all times the treatment accorded it has been the same as to all shippers. At practically every station along the line of the Lehigh Valley the Sales Co.'s coal meets the competition of other dealers; nowhere has it any monopoly, and nowhere does it dominate the markets. *Other dealers freely sell anthracite and at the same, and at times higher, prices than this defendant secures.* There are no shreds or patches of fact to support the petitioner's theories.

June 1st, 1913, the Lehigh Valley Railroad discontinued at Perth Amboy the free storage of coal by shippers, of all shippers, the Sales Company and all other shippers. A petition was filed by the G. B. Markle Co. and others, with the Interstate Commerce Commission alleging that this withdrawal of the free use of storage bins by the Railroad was improper and asking its restoration. Because this defendant has a storage plant at South Plainfield, a shipper of about 50,000 tons a year to tide water points, who has no need of storage facilities sufficient to justify the expense of construction and maintenance of a storage plant, says there is

a discrimination in favor of this defendant in this withdrawal of free storage at Perth Amboy.

This matter was disposed of by the *Inter-State Commerce Commission, Docket No. 5905, Plymouth Coal Co.* vs. *Lehigh Valley Railroad Co., 36 I. C. C. 140*, and *Docket No. 5917, G. B. Markle Company et al.* vs. *Lehigh Valley Railroad Co., 37 I. C. C. 441*, adversely to the contentions of these shippers. The Commission squarely held that the Railroad was justified in its refusal to continue to furnish storage at Perth Amboy and did not sustain the charge of discrimination.

It is a common practice for railroads to lease grounds adjacent to their tracks to large shippers of anthracite for yards, trestles, etc. The petition itself shows (52 to 55) a large number leased to concerns along the Lehigh Valley. As to the routing clauses wherever appearing in these leases they are a dead letter, and have been stricken out, and as far as this defendant is concerned never were observed, or even noted, in dealings with its customers, as to the leases it has. Nothing appears in the proofs showing any restraint or improper dealings by the Sales Co. with its tenants. These leases are few in number and the tonnage sold tenants a small one.

As to the Coal Co., the dealings have been in conformity with the plain and expressed purpose of the contract of March 1, 1912, and the leasehold obligations have been carried out as well. Mention has been made of certain coal purchase contracts the Coal Company was a party to. These were carried out by the Sales Co. until their cancellation in May, 1913, following the decree of the Circuit Court at Philadelphia in the so-called Reading Case (*226 U. S., 324*). Thereafter temporary ar-

rangements were made either verbally or by correspondence to take the Coxe Bros. & Co., Inc. coal, the Forty Fort Coal Co.'s coal and that of the Mt. Lookout Coal Co. The contract with A. Pardee & Co. in effect with the Coal Company in March, 1912, was carried out until January 1, 1913. Thereafter a new arrangement was made whereby the Sales Co. is paid a commission for handling the coal. The Raub Coal Co. purchase contract was carried out until January 1, 1913, when a new deal was made for the purchase of this coal on an agreed basis. None of these temporary arrangements for purchasing this coal were in any way open to the objections to the 65% contracts stated in the opinion in the Reading case, and because of which they were directed to be cancelled.

There have been differences with the Coal Co., the usual friction at times as between contracting parties, complaints as to the preparation of the coal, a requirement by the Sales Co. that the Coal Co. should change its screen meshes in one or two instances to conform to those provided for in the contract of March 1, 1912, and other matters.

Nothing appears in the proofs to show that both the Coal Co. and the Sales Co. have failed in any particular to live up to the contracts between them in all good faith in intent and act.

The contract for the purchase of the Coal Co.'s product does not contain the clauses of the Lackawanna contract before this Court (*238 U. S. 516*); the differentiation is pointed out in the argument and it was not made by an interstate Railroad as one of the parties. It was, as it is hoped to show, a lawful, *bona fide* contract, whose provisions were not in restraint of trade and in every respect a valid agreement.

3. The Markle Sales Agency contract; this defendant's relations to it and the way it is being carried out.

December 30, 1889, the partnership then doing business as G. B. Markle and Co. (afterwards becoming a corporation under the name of the G. B. Markle Company), made a contract with the Lehigh Valley Coal Co. (Gov. Ex. 1, Pet., p. 81 *et seq.*) to remain in force from January 1, 1890, to January 1, 1920, by which it agreed to "consign for sale" to the Coal Co. all its product, the Coal Co. to use its best endeavors to sell it, the coal to be kept separate and apart from the Coal Co.'s coal and to be designated by separate trade names, the Markle Co. to control prices and for that purpose to be advised of each order for shipment—the Coal Co. to pay all "tolls and freights as may from time to time be demanded by the Lehigh Valley and other Railroad Companies upon coal shipped" (83), the Coal Co. to receive a commission of 12½ cents per ton for its compensation in handling the coal. This contract took the place of one that had been in vogue since 1877, the terms of which were not materially different. The Markle concern had certain operations in the Hazleton district producing, as they claimed, a superior quality of anthracite. They desired to avail themselves of the organization of the Coal Co., then engaged in merchandizing its product, to handle theirs. They were very careful to provide in the contract for their complete control at all times of prices and markets. There is not the first suggestion of subserviency to the Railroad in the agreement, nor is there any monopoly in transportation secured. This contract was carried out by the Coal Co. until

it was determined in the winter of 1912, to discontinue its selling and handling of anthracite everywhere. The contract still had several years to run. The selling agency force of the Coal Co. were all going into the employ of the Sales Co. A very large business had been built up in this coal under special trade names. The Sales Co. took over this Sales Agency contract with the tacit consent of the Markle Co., and has carried it out ever since.

In connection with the very large tonnage this defendant purchases and handles, this particular coal could be added without anything like the cost and expense necessarily involved if the Sales Co. were handling it alone. The methods of handling the Markle product in sufficient detail to show them with exactness, the relations of the Markle Co. with both the Railroad, the Coal Co. and the Sales Co., will be discussed under appropriate subheading of the brief of law. It is sufficient to say the transactions throughout were normal, business-like and neither in purpose, intent or effect violative of any law.

4. As to the development of the Sales Company's business and its profits.

There was no reason to anticipate in the winter of 1911-12, the suspension in the Anthracite region of six weeks in the following spring. This occurring, however, at once created an abnormal demand and secured to the Sales Co. exceptional results for its fiscal year ending March 31, 1913. After about six weeks of idleness, work was resumed at the mines with an increase of wages, and following this there was an advance in the prices of certain sizes. There was no occasion to store appreciable

quantities of coal that year at all. The mines were kept busy and practically the maximum production handled (R., 2087). The Company was remarkably successful, far more so than anybody could have forecasted in the period of the negotiations prior to the contracts of March 1, 1912, and the taking over the selling business of the Coal Co. Its dividends at the rate of 10 per cent. per annum were supplemented, after investigation by a Committee of its Board of Directors, by a declaration of a cash dividend of 25 per cent. At the same time it was determined to increase its outstanding capital stock by the amount represented by this dividend, and to accord the stockholders the privilege of using this dividend to subscribe for this additional stock. This was availed of by the overwhelming proportion of the stockholders and resulted in transferring the surplus to capital stock liability. The earnings for the year were less than 3 per cent. on the volume of the business done, the apparently large profits therefore were due to a very small capitalization and exceptional and unexpected developments in the trade the opening year of the Company's business, the effect of which continued into the second fiscal year. The relations that the earnings of a legitimate business enterprise, whatever they were, have to do with the charges of the petition, we do not understand, as there is no charge or proofs of undue, high or monopoly prices, the fact being that the so-called independents secured larger prices than this defendant asked or secured, but be that as it may, they are accounted for in a perfectly legitimate and lawful way. The arguments and conclusions drawn from the profits are to be met and answered elsewhere.

The Sales Co. was not only intended to be, but

actually is an absolutely independent enterprise. The management of its business affairs has always been exclusively in the interest of all its stockholders. The proofs sustaining this, and the absence of any evidence justifying a contrary conclusion, are the subject of separate consideration. It is sufficient to say the record is without any facts disclosing abuse of the power of stock ownership by those in control of this defendant in any respect whatever.

III.

The Argument.

1.

Introductory observations as to the issues raised against this defendant and the entire lack of proofs to support the Government's charges.

The case presents no real issues of fact to be determined upon conflicting evidence. There is no controversy as to the basic material facts involved and the field of argument is thus limited to the inferences to be drawn from and the legal construction to be placed upon undisputed facts. There are misstatements in the petition, unintentional no doubt, due to lack of familiarity with the purposes of the organization of this defendant, what was sought to be accomplished and what in fact and law was accomplished. This is in no sense intended to reflect on the motives of counsel, un-

doubtedly altruistic. There are illogical deductions not warranted by any facts averred, there are arguments and conclusions stated without a single fact averred to support them.

The petition does not name any of the officers or executive officials of this defendant and only one of its Directors (Mr. L. D. Smith) as defendants in the case, although it charges (p. 10) that Mr. Thomas as President, Mr. L. D. Smith as Vice President, and the gentlemen named as Directors of the Railroad are responsible for the continuance of the alleged combinations and monopolizations in restraint of trade and the other things complained of. Mr. Smith is not a Director of the Railroad and never has been. The seven Directors of the Sales Co. as such are not even charged with the taint of subserviency to the Railroad board. The whole complaint seems to be that the controlling stockholders of the Railroad and the Sales Co. are the same group of persons; not that the Railroad owns any Sales Company stock, but the same group of stockholders hold a majority of the stocks of both corporations. Everything is to be inferred from that present situation and all charges of combination and conspiracy and violation of the Commodities Clause flow and it is contended, legitimately flow, from that naked fact.

A scrutiny of the petition discloses a herding of this defendant with the Railroad Company and the Coal Company for the evident purpose of creating the impression that its mere presence as a party in a case will carry inferences of participation by it in alleged wrongful acts of the other defendants, although there are no averments of fact charging it with the remotest connection or association with such acts. This is not a case of common or inter-

locking directorates or of common control in management or direction. There is no charge much less evidence of any such thing. The Railroad owns not a single share of the Sales Co. stock and never has, the same is true of the Coal Co. There is no evidence of the commingling of the affairs of this defendant with any other defendant. There is no proof of favoritism to the Sales Co., preferences accorded it, discriminations in its favor as against other shippers, rebates, allowances, anything warranting criticism either as to matters within the jurisdiction of this Court or the Interstate Commerce Commission. There is no charge even of unfair business methods, or unfair practices against competitors, no charge of the maintenance of unduly high or monopoly prices. The nearest approach to this is the charge that the Sales Co. has made "enormous profits," not that they were unwarranted under the exceptional trade conditions of 1912-13, and the reasonableness of the profits is shown in the record, and that they were perfectly consistent with the unusual conditions of the trade in 1912-13. It was further shown they amounted to less than 3 per cent. of the business done.

All the presumption of good faith in business dealings, of honesty in motive and intent, are "whistled down the wind" by the pleader, and it is asserted,—without any supporting facts to warrant it, and that, too, after all the facts were laid before the Department of Justice and every facility afforded to know exactly everything that had been done,—it is asserted by the Government that the acts of this defendant were a part of a scheme to circumvent the Commodities Clause rather than conform to it. The laborious effort to torture and twist things into evidence of lack of good faith on

the part of the Railroad Company, the Coal Company and the Sales Company, little nothings being utilized to base charges upon, appears everywhere.

It is asserted that the defendants, including this defendant, combined and monopolized

a. by acquiring control of mines and lands along the line of the Railroad.

b. by acquiring the control of the output of independent producers.

c. by exerting the power of the Railroad to give undue preferences and advantages to the coal producing companies, and to discriminate against their competitors.

d. "and by other means".

Notwithstanding the Sales Co. is charged with being a party to all these things, in the averments to support them (pp. 17 to 36, incl.), this defendant is not pretended to have had any part or lot and is not charged with any participation in the transactions.

The charges affecting the principal transactions of this defendant appear under the head of violations of the Commodities Clause (Pet. 61 *et seq.*). It is plainly evident that there can be no violation by this defendant of the Anti-Trust Law unless it is proven to be violating the Commodities Clause (R., Vol. 5, 233). Notwithstanding the averments, therefore, this case practically involved the Commodities Clause prohibitions and nothing else. It is said (P., 66) that the Railroad to retain its monopoly in the transportation and sale of anthracite organized a new corporation "whose stockholders should be identical with those of the Railroad" and to which the entire output of the Coal Company

and all coal which it might purchase should be sold f. o. b. the mines. The plan carried out as averred (66-69) does not disclose "identity of stockholders" and even if there were such identity, *if the entire output of Lehigh Coal Company, and all coal it might purchase, was sold f. o. b. mines,* in what way is there even a sufficient charge of violation of the Commodities Clause? What difference did it make who the stockholders were of the Sales Company or the Railroad?

The contract of March 1, 1912, is charged as not a *bona fide* transaction between separate corporations because of its terms as to five different matters (Pet., 71-72). This criticism is answered elsewhere, and we think shown to be without foundation, hypercritical, and, as to many matters, resting upon misapprehension of the facts.

The general charge (73) that the purpose of the Railroad, and those who controlled it, in organizing this defendant was to use it as a mere instrumentality for retaining under their direction and profit the monopoly they had acquired of the sale of anthracite coal from mines tributary to the Railroad, and that it was accomplished by the arrangements above referred to, falls as entirely unsupported by the facts. It is said the Sales Co. is and must always be subservient to the will and direction of those who control the Railroad. "Such persons have always constituted its dominant stockholders and probably always will, they elect or dictate its officers or directors and through them determine its policies." If we were to concede the premise of this argument, viz., that the Railroad had acquired a monopoly of the sale of anthracite coal from mines tributary to the Railroad, and that those who control the Railroad have always con-

stituted the Sales Co.'s dominant stockholders and even if we add the assertion "probably always will", does the conclusion follow that such dominant stockholders will commingle the Sales Co. affairs or abuse their power as stockholders to make it a mere tool of the Railroad? *Is the mere assertion without a particle of proof to sustain it, a make weight to justify the relief asked in this proceeding?* But neither the premise nor the conclusion is shown to be justified by the proofs. It is true the Sales Co. agreed, *conditional, however, on the Coal Co.'s delivery to it of its product and only so long as it did this,* to confine its efforts to the sale of the Coal Co.'s products except as to certain purchased coal and coal handled on commission, not necessary now to state in detail, but as all agree it requires all its energies to successfully do that, and the production of eight or nine million tons of anthracite a year is so large as to make it plain the handling of it to the best advantage would require practically the undivided attention of the Sales Co. to ensure steady employment at the mines and the maximum possible of purchases, no inference is to be drawn, from such a provision, of subserviency, or lack of integrity of the Sales Company's organization as a separate corporation or that such a contract is illegal. On the contrary the fair inference to draw is just the other way, it is because the Coal Company knew it would have no control of its affairs after the contract was made.

The climax is reached, however, by the charge that because of these covenants the Sales Co. is bound to the Railroad and its subsidiary companies, and has no *bona fide* existence. The ordinary, indeed the irresistible, inference is exactly the

contrary. It was, among other reasons, because the Sales Co. was known to forever be an entirely separate legal being, standing on its own bottom, in no possible way an instrumentality of the Coal Co., these covenants were insisted on by the contracting parties. It was intended to be, and in fact was, a fair business deal by and between two absolutely separate and independent concerns to be engaged in separate and distinct operations, and all provisions were agreed upon in an effort to protect both parties from possible exigencies, difficulties, failures, or non-conformance by either of the contracting parties. This it seems must be manifest from the contract itself and the proofs in the case.

This defendant is in no way shown to be a party to any combination in violation of the Anti-Trust law, or a party to acts forbidden by the Commodities Clause. On the contrary the proofs disclose no facts justifying the charges of the petition.

2.

The purpose of the organization of this defendant, the arrangements assuring its integrity as a separate and independent corporation: the proofs showing the absolute *bona fides* of the whole matter in both intent and act.

The purpose of the organization of the Sales Company it is charged (Pet., 66), was to escape the decision in 220 U. S. 257, and to retain the monopoly in the transportation and sale of anthracite in interstate trade which it is alleged the Le-

high Valley Railroad Co. had unlawfully acquired. It is said a plan was conceived by which a Sales Company should be organized "whose stockholders should be identical with those of Railroad and to which the entire output of the Coal Company and all coal it purchased should be sold f. o. b. at the mines."

It is the settled doctrine of this Court that the decisions of the lower courts upon questions of fact will be followed unless shown to be clearly erroneous.

Brainard vs. *Buck*, 184 *U. S. 99;*
United States vs. *Carter*, 217 *U. S. 286, 301;*
Dun vs. *Lumberman's Assn.*, 209 *U. S. 20, 23.*
The Carib Prince, 170 *U. S. 655.*

The determinative facts as to the legality of this defendant's organization and its transactions are all found by the District Court against the contentions of complainant.

1. *The charge that there was a purpose to secure practical identity of stockholders.*

Assuming the stockholders of the Railroad and the Sales Co. were identical after the organization of the latter, and conceding the Railroad owned the capital stock of the Coal Co., does that vitiate a sale of coal by the Coal Co. to the Sales Co.? Is there any federal law or decision holding that a contract made between them is a sham and a fraud because of such circumstance? It was not charged that the stockholders *were bound to continue "identical"* or that the stockholders *were not to acquire absolute ownership of their stock with*

full rights of sale and transfer as any or all saw fit; there is no pretence of any limitations in the alienation of the stock in the open markets and there could not be under the facts.

There is neither charge nor proof of the slightest attempt in the plan of organization of this defendant to bring about any abuse or unlawful use of its stock ownership. There is nothing shown to justify the charge there was any intent to secure this identity of stockholders, or even that under the plan adopted this was possible if there was such an intent. The petition avers this intent appears by the inclusion in the circular of the Railroad of Jan. 19, 1912 (Govt. Ex. 25, R., 629), issued to its stockholders, giving them the privilege of subscribing to the stock of the proposed Sales Co. of this clause (R., 630).

> "Stockholders who avail themselves of this privilege must subscribe for the whole of their allotment as a subscription for a portion of the allotment will not be considered."

How could such a requirement secure practical identity of stockholders of Railroad and Sales Co.? It could not do this even at the start off, and it is not much less than ridiculous to say it could secure any permanency in the personnel of stockholders of the Sales Co. (R., 1935). As to the Railroad with its stock listed on the stock exchange where thousands of shares are dealt in, sometimes in a single day, it is preposterous to assert that the plan outlined in the circular, if it is read in its entirety, could accomplish any "identity." Further a plain reading of the circular prevents any such "intent" being drawn from the announcements there made. There is a declaration of a cash dividend of 10% of its capital. Stockholders were

accorded the privilege of subscribing to the stock of the proposed Sales Company; *they were not even requested to. They could take their dividend in cash, every cent of it, if they wanted to.* Whatever amount the stockholders of the Railroad Co. did not care to take, the circular announced that Drexel & Co., well known bankers of Philadelphia, would themselves take. The fair inference to draw from a circular so worded would be that the Railroad had no idea how many of its stockholders would take this stock, was rather doubtful whether any considerable amount would be taken by them, and therefore, as it was essential to have the capital taken, this requirement was inserted to insure the success of the plan to dissociate the Coal Co. from all interstate business, on a given date in the near future. There were thousands of stockholders of the Railroad at this time, scattered all over this country and in Europe. This provision was in accordance with the usual practice (R., 55); the Secretary of the Railroad says he knows of no other practice. In effect it was not different from the circular of June 22, 1910, issued by the Railroad at a time of an increase of its capital (R., 2445). The Secretary explains the confusion in accounting that otherwise would arise (R., 58, 59, 60, 1278). The Railroad had nothing to do with the subscriptions to this stock and no control over them (R., 55, 56).

The arrangements to secure capital to buy the Coal Co.'s accounts, stored coal and the starting of the new enterprise had to be completed on a given date; everything had to be ready on that date (R., 1935). *The Sales Co. inserted precisely the same requirement when it issued its circular in the fall of 1913* (R., 1936). It certainly cannot be argued

that the purpose then was to secure "identity" of stockholders with any other concern. If a man wanted to subscribe for the Sales Co. stock all he had to do was to sign the power of attorney to Drexel & Co., and in due course he got his certificate and had no further bother (R., 1936). The Railroad in no way advised, recommended or urged stockholders to subscribe for any of the Sales stock (R., 1256, 1257); the circular itself disproves this charge (R., 1257). It was done as a matter of convenience in accounting, and due to the necessity of Drexel & Co.'s knowing who wanted to subscribe so they could arrange to take the balance, as it was essential that the full capital be paid in cash by the end of February to enable all matters to be closed March 1st. Had it not been required the whole matter would have been delayed to an uncertain date (R., 1258). As a matter of fact a large number of the Railroad stockholders took their cash dividend (R., 1258). Some wrote inquiring about the matter, and to them there never was an intimation given either verbally or in writing that it would be desirable for them to take Sales Co. stock (R., 1258). The fact that the greater part of the capital of the Sales Co. was taken by Railroad stockholders (Sales Ex. No. 9, R., 2465), and that they exercised their lawful privilege, is no proof of any forcing or compelling them to do so. Even if there were such a purpose it amounts to nothing in view of the act of the Sales Co. almost immediately after its organization arranging to have its stock listed on the New York curb market (Sales Ex. No. 10, R., 2468, see also Sales Exhibits Nos. 11, R., 2472, No. 12, R., 2478, No. 13, R., 2480, No. 14, R., 2486), *and the evidence of the free alienation and*

constant transfers of its stock ever since. The alleged intent had no effect on this defendant.

Since the decision of this Court in the *Lackawanna case, supra*, there is no room for the argument, if there ever was before, that from the mere fact that the majority of the stockholders of the Railroad also constitute a majority of the stockholders of the Sales Co. the inference can be drawn that the Sales Co. is not a separate and *bona fide* corporation or that its relations with the Coal Co. or the Railroad as a shipper were illegal or violative of Federal law. It must not be overlooked that the Sales Co.'s dealings, other than a shipper (and as to its shipments over Lehigh Valley rails it is on the same plane with other shippers) were and are at all times with the Coal Co.

As to the relations between the Railroad Co. and the Coal Co. the Court below found after a careful consideration of the entire record as follows (*225 Fed. 399, 404*):

> 6. The allegations of the bill of complaint permitted as an amendment by the Second Commodities case were fully denied and have never been proved—but if they were true prior to March 1st, 1912, they are now immaterial.

These allegations of course had to do with alleged interrelations between the Railroad Co. and the Coal Co. involving abuse of stock ownership and placing the Coal Co. in the position of a department of the Railroad rather than a separately managed, *bona fide* corporation "standing on its own bottom". The situation therefore is entirely different in the instant case from that presented in the *Lackawanna case, supra*, as is pointed out elsewhere in this brief in detail. But under the facts in this record, even if the Sales Co. had made its contracts direct with Lehigh Valley Railroad, we confidently

assert, under the test laid down in the *Lackawanna case*, the Sales Co., with separate offices and separate officers and Directors, and a complete and separate management of all its affairs, not partial or in form merely but actual in every respect and act, would not be shown to have been a party to a violation of the Commodities Clause or a member of a combination prohibited by the Anti-Trust Law. In other words, it is not unlawful for two corporations to have stockholders in common. Far more than that must be shown to justify the charges of this petition.

2. *The charge that the plan of organizing the Sales Co. was a scheme to circumvent the commodities clause prohibitions and to retain the Railroad's alleged unlawful monopoly in the transportation and sale of anthracite coal.*

This charge affects the *bona fides* of the arrangements by the Coal Co. to confine its business entirely to Pennsylvania, the negotiations as to the contract and lease with the Sales Co. of March 1st, 1912, and the integrity of the defendant's organization as a separate and independent enterprise. It is not proposed to state the situation prior to these arangements and the controversies with the Government in the suits referred to. Quite aside from the merits of the case, and notwithstanding the denials by the Railroad and Coal Co. therein of any commingling of affairs, etc., it having been determined to discontinue the selling department of the Coal Co. and arrange, if possible, with a sales company by a contract to sell all coal mined, purchased, owned or acquired by the Coal Co. so that title would vest in the Sales Co. before the transportation commenced (R., 657), the problem con-

fronting the officers of the Coal Co. was a serious one (R., 1969).

The Coal Co. was doing business in practically all States east of the Missouri River and in Canada (R., 1245). The Vice-President and General Sales Agent at that time was Mr. J. W. Skeele; he had absolute charge of the handling and selling of the coal (R., 1245).

It was not practicable to attempt to dispose of the coal to dealers at the mines (R., 1245). The Coal Co. was the lessee of the Railroad of certain storage plants and other facilities (R., 1246). Then it had itself constructed very many important facilities in the way of handling plants in addition to those leased (R., 1246). It was indispensable to find some person or concern with sufficient capital to buy the coal stocked in its storage plants, coal in transit as of a certain date, the bills receivable, and with sufficient credit to secure a working capital to continue a business aggregating over thirty million dollars a year (R., 1246). It was uncertain as to whether the stockholders of the Railroad Company would care to go into the organization of such a corporation, as there could be no guaranties and no assurances of the future prosperity of such a company (R., 1247). After various discussions as to the proposed capitalization of such a company, it was thought more conservative to organize it with a small capital, and it was estimated that the smallest capital on which it could satisfactorily do business would be six millions of dollars. Mr. Skeele was personally familiar with every step that was taken, and as soon as it was determined to organize a Sales Company, Mr. Skeele was placed in entire charge of all matters that related in any way to the future business of the

proposed company (R., 1248). He suggested the incorporators; he asked the gentlemen to associate themselves with him in the proposed new organization. There was no occasion to dissipate the going business or to destroy the value of the Railroad stockholding interest in the Coal Co. by sacrificing the Coal Co. property and assets. There was nothing in the adjudications of the Commodities Clause cases requiring any such thing. The property rights of the Coal Co. and of the Railroad Co. as its stockholder, and of the stockholders of the Railroad, were to be conserved and protected. It was most desirable to try and work out some plan that would relieve the Railroad of any ground of criticism, protect the very large and valuable property of the Coal Co. and assure it a reliable customer for its coal at the mines, and somebody who could carry out its obligations under the Markle contract, and its coal purchase contracts. A very large sum of money would be required to enable the Coal Co. to get rid of its selling department on a reasonable, fair basis, provide a purchaser for the coal at stocking points, buy bills receivable, take over leases, storage plants, trestles, etc. The business was not to be thrown away or destroyed. Surely the Government would not ask any such thing as that! These matters were first taken up in the fall of 1911 (R., 1903), Mr. John G. Johnson, the General Counsel, was consulted (R., 1242), *and all that was done followed his advice.* It goes without saying, his advice involved some plan that would work no injury to the stockholders of the Railroad, and that would at the same time insure, beyond cavil or criticism, compliance with the Commodities Clause prohibitions. It was regarded impossible to try and sell the mines of the Coal Co.,

assuming a customer could have been found, because the property was pledged not only under its own mortgage but the stock of the Coal Co. was pledged under the general consolidated mortgage of the Railroad (R., 1281). *An insuperable obstacle presented itself otherwise.* A very large portion of the lands of the Coal Co. was held under leases, the provisions of which did not permit of assignment to third parties. Anybody who attempts to argue that the coal properties of the Lehigh Valley Coal Co. as held, the collieries and equipment, the properties also of Coxe Bros. & Co., Inc., could be sold on a certain day without an absolute destruction of values, and disregard of the duty resting on those in charge of their affairs, or even that they could be peddled out (R., 1969) at piecemeal at anything approaching even 50 per cent. of what they were worth, has little knowledge of conditions in the anthracite region or the properties of these companies. *It is idle to talk about this anyway, for there was absolutely nothing in the situation requiring suicide or slaughter.*

The matters connected with so large an undertaking were most carefully considered in all their bearings. Mr. Skeele, at that time the Vice-President and General Sales Agent of the Coal Co., was asked to organize a Coal Sales Company with which he was to identify himself and to retire from his association with the Coal Co. He had had full charge of the selling end of the Coal Company's business, was an experienced sales agent, a gentleman of high character (R., 1904). *He chose his associates to go with him into the new enterprise, and the first board of directors were of his selection.* Then he and they took out a charter under the laws of New Jersey (Sales Ex. No. 5, R., 2451).

Attention is called to the purposes of the Sales Co. there stated, its objects and powers. He asked Mr. Wilson, then the General Auditor of the Railroad, to go with him because of Mr. Wilson's knowledge of and experience in accounting matters; there was plainly need of such an experienced associate. Mr. Skeele realized the necessity for having a board whose personnel would ensure credits at the banking institutions. There were times when large sums of money had to be borrowed to take care of payments for coal which had to be bought each month, and stored somewhere awaiting sales. Agents' salaries had to be paid and provision made for overhead charges during slack times. Mr. Lamont of J. P. Morgan & Co., Mr. Lloyd of Drexel & Co. and Mr. Hine, the President of the First National Bank of New York City, were asked to go on the board. So was Mr. L. D. Smith, for many years in charge of accounting matters in the Railroad service and at the time a Director of the Coal Co. in direct charge of its financial affairs. *What did Mr. Skeele know about the stockholdings of these gentlemen, whether much or little or none, in the Railroad?* Where is there anything in the record to suggest he did, and that it was because of that they were chosen? Mr. Paul Moore became a director. He was a son of a Mr. Moore who was a large stockholder in the Railroad. The circumstance of birth is held up as an *indicia* of the *mala fides* of the Sales Co. organization. Is not this a *non sequitur?* Is it to be assumed he would abuse his power as a stockholder or director of the Sales Co. because he is the son of his father? Is the assumption a reasonable one as to his father? Mr. Paul Moore was a lawyer in this City associated with the well known firm of O'Brien, Boardman & Platt, an ex-

perienced man in contract matters, whose judgment would be of great assistance in managing the immense business. Is not this a fairer presumption?

There is not the slightest hint in the record that any of these directors ever acted in the Sales Co.'s management other than directors act in independent enterprises everywhere, and solely for its best interests. We are dealing with the assumptions and alleged presumptions of the petition. *None of these gentlemen ever had had any relation or association with the management of the Lehigh Valley Railroad except Mr. Smith and he only as to accounting matters, and none of them had ever been a member of its directorate.*

> "Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."
>
> *Interstate Com. Com.* vs. *Chicago G. W. Rwy., 209 U. S. 108, 120.*

This language of Mr. Justice Brewer is in striking contrast with the assumptions, conclusions and arguments of our adversaries. Are gentlemen of the highest integrity and standing in business circles who have testified under oath to the matters associated with the organization of the defendant and the contracts made, and to the transactions since, and that everything was done with the utmost good faith, to be assumed to be concealing the real purpose and be charged with being conspirators against the law and parties to a scheme to circumvent it? *Is this to be done not upon any proofs to sustain the charges but in an effort to create suspicion by the very charges themselves!*

The case of *U. S.* v. *Stinson, 197 U. S. 200,* holds that in a suit in equity the Government is subjected to the same rules as an individual respecting the burden of proof, quantity and character of evidence and presumptions of law and fact. In that case Mr. Justice Brewer says (p. 205), quoting from another case:

> "It should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction shall make such an attempt successful."

To the same effect is

Brent vs. *The Bank, 10 Pet. 61½.*

The arrangements having been completed assuring a Sales Co. with a capital paid in, thought sufficient to deal with the situation successfully, and an organization that ensured a reliable customer for the Coal Co.'s product in the future, Mr. Skeele and Mr. Wilson and counsel representing the proposed new enterprise (R., 1248), and Mr. Smith, Mr. Warriner and Judge Wheaton representing the Coal Company (R., 1906) held conferences and negotiated as to the manifold things to be done, and arrangements agreed upon, to make fair and equitable arrangements (R., 1918, 1919, 1926) between the Coal Company and the proposed Sales Company to absolutely dissociate the Coal Company from all connection with the handling and merchandizing of anthracite coal and to enable it to confine its business to its mines in Pennsylvania. Everything had to be forecasted as to the future. This was because it was determined to make this radical change in Coal Co.'s affairs as of March 1st ensuing (R., 1909) and as of that date to sell and dispose of all its stocked coal, coal in transit

in February, its accounts against customers, its leaseholds, its unfilled contracts with customers, its selling agencies, its coal purchase contracts, its contract for handling coal on commission, and everything associating the Coal Co. in any way with the handling or selling of coal outside of Pennsylvania. The Sales Co. was to take its place but upon terms and by contracts and leases ensuring equality of treatment to the Coal Co. and the Sales Co. It is difficult to understand how any fairer or more equitable plan could have been adopted than the one finally determined upon and carried out.

3.

The contract of March 1st, 1912, between Lehigh Valley Coal Co. and this defendant shows on its face integrity of purpose and effect, to be carried out by separate and independent corporations, the proofs show it was fair to both contracting parties and equitable in its terms, and do not support the charges affecting its *bona fides*, or that it was in restraint of trade.

This contract (Govt. Ex. No. 3, Pet., p. 89 *et seq.*), the result of so many conferences, so many considerations and preliminary investigations, to secure protection to both parties (*as it was known the Sales Company was to be an entirely separate and independent corporation*) the petition charges with being not a *bona fide* contract but a scheme to circumvent the Commodities Clause prohibitions.

It goes so far as to say that the Railroad Co. still retains title to the coal purchased by the Sales Co. under the terms of this contract during its transportation to market. It did not so impress the former Attorney General of the United States to whom it, as well as all matters affecting the organization of the Sales Co. and all contracts were submitted. His opinion, included in our statement of facts, *supra*, was that the arrangement affected by this contract was one made apparently in good faith, *that the title to the coal passed at the mines and that the Railroad had no interest in the commodity during transportation.* For the convenience of the Court we have printed as an Appendix this contract in full and also the contract involved in the *Lackawanna case (238 U. S. 516)*, as it is proposed to compare them elsewhere in this brief. An examination of our contract itself, it is submitted, will show not only the absolute good faith of the contracting parties, the recognized separateness and independence of each, but the painstaking care observed to provide for all contingencies and possibilities, in the spirit of equity and fair dealing.

It is true the conferences were held while the parties were in the employ of the Coal Co., but does this affect the *bona fides* of the plan or the result? It had been definitely determined that the Coal Co. would cease merchandizing coal on the first of March and sell its coal to the Sales Co on a fair basis. How was it practicable to handle the matter any differently? The Coal Co. had to do business day by day or go out of business and close up its mines. The months of January and February, 1912, were no more than sufficient to determine matters and get them in shape. During the time

required to insure the capital for the Sales Co., whether it came from stockholders of the Railroad exercising their privilege to subscribe for its stock, or was furnished by Drexel & Co. who had undertaken to furnish whatever amount the Railroad stockholders did not care to take, the arrangements had to be made by which the Sales Co. was to take the coal produced by the Coal Co., and its purchase coal, and acquire its leases, contracts, bills receivable, etc. The fair basis for taking over all these things had to be arrived at (R., 1250). Mr. Wilson ceased performing his duties as General Auditor of the Railroad, January 1st (R., 1966). *The negotiations during January and February were between Mr. Wilson and Mr. Steele and counsel on one side, and Mr. Warriner, Mr. Tompkins and counsel on the other.* Mr. Smith states the general purpose of the contract as it was expressed in the writing; it tells the truth about the matter. Its terms were fair and equitable to both parties (R., 1262). In other words, every effort was made to equitably treat all the various matters involved in a transaction of such magnitude on a basis of fair dealing as between two concerns, without either making any effort to get the better of the other, and without any hope on the part of the negotiators to assure to one of the contracting parties anything more than it was fair and right to accord it. Everything was arranged in a way to dissociate the Coal Company as of March 1, 1912, with every debit and credit, every interest or concern, relation or association with its selling department prior to that date, with its agencies and business of every name and nature connected therewith.

A mistaken view of the evidence is involved in the assertion that everybody was committed to "*the*

deal" by the offering of the stock subscription to the Railroad stockholders. Everybody was committed to a deal that involved (1) a Sales Co. that should forever be an independent and separate corporation; (2) the making of a contract with it that would insure a sale of the Coal Co.'s own and purchased coal at the mines in Pennsylvania to this new organization; the details and terms of such a contract to be worked out so as to make it fair to both parties as separate and independent corporations; (3) the taking over of the Coal Co.'s selling organization, its accounts and leasehold properties; (4) the absolute divorce in good faith, and as a finality, of the Coal Co.'s entire relations and associations with handling and merchandizing coal.

The only reasonable way under all the circumstances to go about the matter was the one adopted.

Certain features of this contract are pointed out in the petition evidencing, it is claimed, that it was a mere subterfuge and demonstrating the "oneness" in reality of the Coal Co. and the Sales Co. They are asserted to be *indicia* of a purpose inconsistent with honest dealing and a desire to actually comply with the Commodities Clause.

It is proposed to take them up in order.

a. *The charge that prices provided to be paid for the stocked coal were unreasonably low (Pet., 71), and that the prices paid for the smaller sizes were not even enough to pay the freight rate to the points where much of the coal of these sizes was stored. "The total amount paid for all the coal including all sizes did not equal the freight rate to the points where the coal was stored plus the waste in transit and the cost of production."*

The position of the Government is that the Railroad by reason of its commingling of its affairs with the Coal Co. was violating the Commodities Clause and had an interest (as it owned the stock of the Coal Co.) in the coal during its transportation. The Railroad and the Coal Co. were seeking to obviate any and all criticism as to their interrelations; the Coal Co. was making arrangements to divest itself of all interest in its coal stocked at various plants throughout the country. To do this it must sell it. If, however, it sells it at a price the coal specialists of the Department of Justice think "unreasonably low," that circumstance is proof that it has not actually sold it at all. Does it not strike the Court as a little unfair to utilize such a circumstance (if the proofs warranted the criticism and they do not) as an argument affecting the validity of this contract?

This stored coal was of no value unless it could be handled in interstate markets. The Coal Co. could do nothing with it without engaging in such transactions. Therefore the price received for it, whatever it was, is of no consequence so long as there was an actual sale.

The Government however excuses itself for this arraignment on the ground that this is a circumstance indicating that the contract of March 1, 1912, was not a *bona fide* transaction between two separate corporations (Pet., p. 72).

The proofs however do not support this charge. The officials of the Coal Co. and of the Sales Co. testify the prices paid were reasonable and fair (R., 1912, 1862, 3 and 4). The parties were treating as to quantities of coal that would be found to be in storage at midnight February 29; the quantities were constantly changing, coal comes in and goes

out. The Coal Co. had coal stored in 39 different stocking points scattered throughout the Middle and Western States (Govt. Ex. No. 109, R., 955-6). Just how much would be found at these plants on the morning of March 1st, nobody knew. The prices finally agreed upon were the result of bargaining, of discussion, of a full and fair consideration of everything. The quantities were ascertained by a measurement of the piles and estimates, this being the only way the matter can be determined in advance of actual rehandling (R., 1970). Estimates or measurements were made out about the time of the making of the contract of March 1st to determine whether there were any very large discrepancies between the stock of coal at a given point and what the measurements would indicate was the approximate amount actually there as appearing by measurements.

The books showed the amount which ought to be on hand at the various storage places based upon reports as to the amount of coal (R., 1971). Steps were taken to check up this book tonnage by measurements made, from which were computed the tonnage which the various piles realized. There were certain adjustments made. These things were done by the Coal Co. before the Sales Co. began operation, the object being to bring it all down as near as might be to the book value and actual conditions (R., 1971). The Coal Co. made measurements and adjusted their books as the Sales Co. were advised, and on March 1st the Sales Co. took over the people who were in charge of all the stocks of coal. The first report of the Sales Co. was that there was on hand so much of this and that and the other size, which was the same as the report of the Coal Co. of the night before (R., 1972). The inven-

tory of the stocked coal upon which the prices were paid showed a tonnage of 388,911.96 tons all sizes (Govt. Ex. No. 110, R., 957-60). *In the purchase of this stocked coal the Sales Co. paid $1,315,884.36 in "spot cash"* (Govt. Ex. No. 111, R., 961). It certainly was not sacrificed or handed over to the Sales Co. under these facts.

So careful were the negotiating parties it was provided (Pet., p. 90) there should be an equitable adjustment of the taxes for 1912 assessed or to be assessed against the stored coal, and this adjustment was afterward made.

The question of freight rates, either into the storage plant or out, did not enter into the deal. There was a certain quantity of coal at various stocking points. Degradation, of course, is inevitable (R., 1926). The freight has been paid on this coal as a prepared size. Whether the Sales Co. could realize from the tonnage of degraded coal as much as the freight that had been paid upon it depends upon the size of the coal, the location of the market and whether that much could be obtained for it (R., 1972). There were a great many elements of uncertainty about a stock of coal as to how much would be realized in tonnage, because of degradation and shortages. The parties further had in mind that on the first of April ordinarily the price fell 50 cents a ton, so that they endeavored to arrange a price by which the Sales Co. could purchase and pay for the coal which would be on hand as of a given future date, namely, March 1st, at about its book value on the books of the Lehigh Valley Coal Co. as of that date. It was particularly fair to the Coal Co. The parties were obliged to forecast matters as they would stand as of March 1st (R., 1912). Finally the prices were fixed as appears in the con-

tract for the purchase of the stored coal. These figures were equitable and fair to both parties. *The purpose and intention of everybody was to treat the problem in all its phases equitably and fairly* (*R., 1912*). Answering the criticism of the Government that as to some of the small sizes and the price stated was less than freight rate, Mr. Wilson, the President of the Sales Co., says the agreement was to buy the entire tonnage of all sizes (R., 1912), the Sales Co. taking the chances in the matter of degradation and losses in rehandling. In his judgment this particular charge as to the price to be paid for small sizes has no bearing whatever. There are no small sizes shipped to any western storage plants. The small sizes stored at those points are the result of degradation. They are not shipped there as such from the mine. These small sizes go from the mines as prepared sizes and are the result of the breakage in handling and rehandling the coal at the storage points, are screened out and are re-prepared to the extent of the screening. For this smaller coal they have to take whatever they get, which is nearly always less than what would be the freight on such small coal if it was shipped in small sizes from the collieries, which it is not (R., 1913). This is just as true of the plants at eastern points as at the western points (R., 1913). There was no ascertainment at the time of the negotiations when the coal at the different storage plants went into those plants. There was no way of determining the length of time at which all of the coal had been there. Some of it might have been there for several years (R., 1858, 1914). It would have been impossible to have ascertained the exact date and the price in effect as of that date as to the small sizes, and as to the freight rate ap-

plicable to such sizes as of the date of the deposit of each ton of each size of this large tonnage at the several stocking points (R., 1459, 60, 61, 1915).

The prices paid worked out very closely to the net book value of the Coal Co., the difference between book values being less than one-half of one per cent. The book value included the cost of production and the freight paid to the storage plants (R., 1969-70). The book values were used as the starting point (R., 1251); they did not represent the amounts in hand, however (R., 1251), and were not relied on entirely. The parties representing the proposed purchaser and the Coal Co. discussed the question at length and the prices were finally agreed upon. The tariff showing rates to stocking points throws no light on the rates paid when this coal was shipped to the various storage plants. Tompkins, General Auditor Coal Co., testifies the prices paid were full and fair (R., 1682). He says the Sales Co. had to take book quantities as they were ascertained by measurement,—the only way to determine it,—as of March 1, 1912, and pay spot cash in advance and upon quantities as shown on the books after such measurements as could be made, the Sales Co. taking all risks of shortage. There are always such shortages. Two per cent. of book value would have been low to represent the shortages in rehandling (R., 1683). If the Coal Co. retained this coal it would have been obliged to dispose of it to customers throughout the country at various prices over periods of six months (R., 1683). By comparing with prices and quantities as shown on books, Sales Co. prices paid varied from book prices one-half of one per cent. (R., 1684). The way the parties went about it to sell the Sales Co. this stocked coal as of a given date

was the only practicable way to do it (R., 1982). The prices were considered fair and equitable, the sale was consummated and the prices paid in spot cash. In addition to the prices paid the contract required the Sales Co. to assume and agree to pay all unpaid charges of every nature incurred in connection with the storage of this coal and to assume all risks and obligations in connection therewith from the beginning of March 1st (Pet., 90); this included advance insurance and freight charges amounting to thousands of dollars.

b. *The criticism that the prices agreed upon to be paid for the Coal Co.'s product were materially lower than those prevailing and paid by the Coal Co. to other producers.*

The contract provided for 65 per cent. prices, but temporary allowances were provided for, as to the coal mined by the Coal Co. (Pet., 97) on a sliding scale and all terminating in five years,—the first of 7 per cent., the second year 6 per cent., the third 5 per cent., the fourth 3 per cent., and the fifth 1 per cent. These allowances are cited as evidence that the contract was not a *bona fide* transaction between separate corporations.

If the Sales Co. was not a separate corporation from the Coal Co. none could ever be created. The Coal Co. had one stockholder, the Lehigh Valley Railroad; the Sales Co. at the date this contract went into effect had thousands. The separation between the Coal Co. and the Sales Co. was not only intended to be complete and forever, but the very composition of the two corporations necessarily made it so.

The reasons stated for these temporary allowances justify them to any fair minded man.

Was it wrong or fraudulent for the Coal Co. with its investment in coal lands, its breakers producing millions of tons a year, its established selling agencies which it had taken years to build up, its trade established in many states, to desire that the Sales Co. that was to take over, handle and develop all these markets and outlets for its coal should agree to devote practically all its energies to the prosecution and development, indeed enlargement of its trade? After the fullest investigation of the matter in all its phases by men of long experience in all branches of the coal business, was it evidence of bad faith in consideration of the Sales Co. agreeing to use all efforts to develop and enlarge the trade to allow concessions for the few years, evidently regarded sufficient to cover the time required to establish new agencies and new markets, necessarily unprofitable at first, and until the business could get a fair foothold at such points? The Sales Co. was to agree to use its best efforts to give orders for deliveries which would enable the Coal Co. to work its collieries as many days in each year as possible. It further was to agree to use its best efforts to develop trade and increase sales and widen the markets for the coal (Pet., p. 94). Everybody knew that meant expenses larger than those necessary to handle the present business. Is there anything shown in this record to impugn the motives of these gentlemen in this matter, or the testimony they have given, to show the reasonableness of this provision, viewed from the standpoint of the Coal Co. to serve its best interests and viewed from the standpoint of the Sales Co. to secure equitable treatment? On one side were Mr. Warriner, General Manager of the Coal Co., in charge of its opera-

tions in Pennsylvania (R., 1906) (now the President of the Lehigh Coal & Navigation Co. of which mention is made in the record), and on the other, Mr. Skeele, who had been in charge of the sales business of the Coal Co. for many years (R., 1252, 1926).

There were counsel present representing both contracting parties (R., 1252). The fixing of the price to be paid for the product of the Coal Company was a matter of a great deal of consideration and deliberation. On the one hand, the Coal Company desired to be insured a customer that would devote practically its entire time to finding markets for its very large production, and one equipped in the business in order to develop such markets and enlarge its trade, and to insure a customer that would be most likely to insure as satisfactory work at the mines as possible, and promptly pay for its coal delivered month by month. It was producing and selling at the time eight millions of tons a year. It was the hope of both of the negotiating parties that this tonnage could be still further increased and its trade enlarged and expanded. This, however, it was recognized, would require large expenditures by the Sales Company in new territories, and in the development of better trade conditions in territories in which they already were, and that this would justify some concessions during the time of such efforts. The result of the entire matter was the fixing of prices with the temporary allowances as they appear in the contract (R., 1265). It really was a matter for these parties to determine themselves, and it is difficult to understand how they can be fairly criticised for the figures they finally reached as the basis of the price to be paid for the product of the

Coal Company, but, assuming it is a proper subject of inquiry as having some bearing upon the question of the *bona fides* of the contract, there is nothing in the proofs anywhere to warrant any suggestion of *mala fides* on this account (R., 1264). Mr. Wilson very clearly explains the occasion for the temporary allowances from the 65 per cent. price. The Sales Co. were to take over the business as a going concern with respect to the sales and merchandising of all coal, and all its facilities, storage plants and yards; the good with the bad, the lean with the fat. The Sales Co. was not to pick out one market or one yard and say that was good, and another and say that was bad and that they wouldn't take it.

> "We had to take it all. We had a great deal of figuring and consideration and discussion back and forth and the Coal Co. had in mind to bind us to use all our best efforts to extend the markets and to increase the business and enable them to handle as much as was practical or possible, so that we felt it was only fair that we should have prices which would result from such basis as was finally agreed upon, temporarily" (R., 1917).

Much stress is apparently laid by the Government on these allowances; they are nothing more nor less than a part of a mathematical formula for applying the prices agreed upon. The Sales Co. agreed to purchase the product of the Coal Co. at certain prices, these prices to be increased gradually each year for five years, after which the Sales Co. would pay no further increases in prices. In order to express this concisely in the contract, and not to burden the contract with pages of the agreed prices resulting from the application of this sliding scale, the brief language of the contract was em-

ployed, the variations of the sliding scale from year to year being expressed in percentages and spoken of as allowances. These deductions were to cease entirely in five years; the contract was to continue for ten years.

What is the natural inference to be drawn from the time limitation as to the deductions? Is it not clear the deductions were agreed upon for the reasons outlined above? If not, why were they not made for the entire life of the contract? We are dealing with the undisputed evidence of the parties who made the contract, what their motives were, and whether the Sales Co. was to be the "absolute owner" of the Coal Co.'s product at the mines so the Sales Co. could ship this product from the mines "to such points as it may see fit" (Pet., p. 89); in the light of the surroundings, of the purpose of the contract, and of the conduct of the parties after its execution, the argument as made, we think, is a perversion of natural thought and natural language. We have elsewhere shown with supporting references what the Sales Co. did in extending and developing markets. The best proof that the temporary deductions were recognized as fair to both parties, and a perfectly natural and normal business deal, and further that the Sales Co. in good faith has justified these temporary allowances, is the fact that as provided in the lease of the coal facilities the Sales Co. has at three different places asked for additional pocket capacity and enlargement of such facilities (R., 1978, 190).

The Government treats this matter as if this provision of the contract amounted to a deduction from the 65 per cent. basis of over a million dollars a year during the life of the contract (Brief, p. 276). *This is in the face of the plain provision that all deductions cease in five years* (Pet., p. 97). To

illustrate the unfairness of this statement, the average for the fiscal year 1913 (Govt. Ex. 48, R., 681) is taken and it is applied to the calendar year tonnage (L. V. R. R. Ex. 62, R., 2315); the average price paid on the 65 per cent. basis during the fiscal year ending June 30, 1913 (our fiscal year ending March 31st) is arrived at apparently by taking the six averages shown on Government's Exhibit No. 48 and dividing by six. The actual average would be ascertained by dividing the total tonnage into the amount paid. It is not very important, however, what the correct figures show for the first year. Assuming now the amount of the deductions establishes something in favor of the Government's charges as affecting the legality of the contract (and we submit it can have no bearing upon the legal issues tendered in this case) the question would be, what do the allowances amount to during the life of the contract? If we were to assume an equivalent tonnage of 6,000,000, and the average price paid, of $2.6628, prevailed during the years to which the deduction applies, that is to say, the first five years of the contract, it is easily ascertained under the sliding scale deductions for each year. The contract is now in its fifth year and the last year in which any deduction is to be paid, and on the basis of the figures above, the deduction will amount to less than $160,000.00. For the next five years there are no deductions of any kind.

There is, however, a new feature introduced in the dealings between the Coal Company and the Sales Company (amounting in effect to a modification of the prices paid) as is shown in our discussion as to the anthracite tonnage tax, and, upon the assumption of the equivalent tonnage, this tax of 2½ per cent. ad valorem added,

since April 1, 1914, to the prices paid the Lehigh Valley Coal Company, would amount to practically $100,000 a year. The net result to this defendant during the life of the contract as to the allowances for the first five years, therefore, would amount to less than $220,000. *We are not to be charged with any recognition of the importance of these allowances or of their relevancy to the issues in this case by answering the unwarranted charges and giving these figures as to what they amount to.* On the Government's own figures the amount paid the Coal Company for the coal purchased during the period utilized for their illustration (Govt. Brief, p. 274) was $14,507,167.04. This sum was paid for an actual tonnage purchased during that period of 5,540,468 tons.

Considerable ingenuity is spent in the Government brief in an effort to establish that these temporary deductions constitute a rebate and discrimination given by the Coal Co. (alleged to be the *alter ego* of the Railroad Co.) and it is asserted that this contract ought to be annulled for this reason. The case of *United States against Union Stock Yard, 226 U. S. 286,* is cited as an all-sufficient authority.

This case first came before the Interstate Commerce Commission, was appealed to the Commerce Court and then to this Court. It was based upon alleged violations of Sec. 2 of the Interstate Commerce Act which forbids rebates, Sec. 6 which requires filing schedules of rates with the Commission and Sec. 20 which requires annual reports to be filed by common carriers with the Commission, and Sec. 1 of the Elkins Act as amended, which provides that it shall be a misdemeanor if a common carrier fail to file and publish tariff

rates or to strictly observe such tariffs, or to give rebates or preferences in any manner.

The case has no bearing upon any of the issues tendered in the case at bar.

The instant case is brought, the petition declares, to prevent the defendants from violating the Sherman Anti-Trust law and "to prevent the Lehigh Valley Railroad Co. from transporting in interstate commerce anthracite coal in which it has an interest, in violation of the Commodities Clause" (Pet., p. 5). This clause is a part of Sec. 1 of the Act to regulate commerce (24 Stat., 379) as amended June 29, 1906 (34 Stat., 584), and this the petition sets forth (p. 4).

The Union Stock Yard case is not founded upon the Commodities Clause or any part of Sec. 1 of the Act to regulate commerce; it is not even referred to in the case anywhere. The case involved questions over which the Interstate Commerce Commission had exclusive original jurisdiction, and had to do with subjects entirely foreign to this controversy.

To maintain this bill the Government must show that the Lehigh Valley Railroad is transporting anthracite coal which it owns, and in which it has an interest direct or indirect, within the meaning and interpretation of the Commodities Clause by the Supreme Court (213 U. S. 366).

The case, therefore, might well be dismissed at once; an examination of it, however, discloses no pertinency to the contract between the Coal Co. and the Sales Co. even if the issues tendered in this proceeding permitted its consideration.

Louis Pfaelzer & Sons were engaged in the slaughtering business, their plant being located in the vicinity of the tracks operated by the Junc-

tion Co. and the cattle pens of the Stock Yard Co. This plant was condemned by the Department of Agriculture and it became necessary for the Pfaelzers to build a new plant, and in order to enable them to do so the Stock Yard Co. advanced them the sum of $750,000 upon a contract which obligated the Pfaelzers to maintain and operate the plant for a period of fifteen years and only use in their slaughtering business such live stock *as was received through the Union Stock Yards and pay the charges incident thereto, being the transportation charges of the Chicago Junction Railway* (lessee of the Union Stock Yards Co. and identified with it *by* common stock ownership, because 90 per cent. of the stock of the Union Stock Yards Co. and all the stock of the Chicago Junction Railway Co. was owned by the Chicago Junction Railways and Union Stock Yards Co., called the Investment Co. in the opinion, p. 295) for transportation by the Chicago Junction Railway Co. of the live stock through the stock yard, and also the charges of the Union Stock Yards Co. for loading and unloading cattle, feeding and watering live stock shipped to consignees doing business in the stock yard district.

This Court held this to be a discrimination in favor of the Pfaelzers over the other shippers by the Chicago Junction Railway Co., which was controlled as above shown, *and in the manner above shown*, by the same company which controlled the United Stock Yards Co., as it was in the nature of a bonus to the Pfaelzers and only another name for a rebate or concession to them upon the volume of their business.

Let us now compare the situation thus appearing

in the Stock Yard case with the facts we are dealing with.

First. The Lehigh Valley Coal Co. is not the *alter ego* of the Lehigh Valley Railroad Co.

Second. The Lehigh Valley Railroad Co. does not own a share of the Sales Co. stock and never has, moreover it neither controls, attempts to control, or has the power to control the Lehigh Valley Coal Sales Co.

Third. The temporary allowances were upon a good and valid consideration, *and appear so on the established facts.*

Fourth. Under the plain terms of the contract the Sales Co. were to ship the coal it purchased as it saw fit; *there is not a word in the contract binding the Sales Co. to route its coal over the rails of the Lehigh Valley Railroad.*

c. *The criticism because of assignments of Coal Co.'s sales agency contracts and the leases to certain local dealers containing clauses that the coal they handled was to be bought from the Coal Co.* (Pet., p. 91).

How could the Coal Co. get out of business, and how could the Sales Company take over the going business so as to be equipped to buy the product of the Coal Co. at once and continuously, and pay for it month by month, and retain unfulfilled contracts without taking over these sales agency contracts? (R., 261). These contracts were few in number and mostly were for steam sizes. It would have been impossible for the Coal Co. to carry them out, and that is all there is to it.

There were a few leases the Coal Co. had made with local dealers at certain points. They were a

part of the business as it then stood. The situation cannot be restated too many times. The Coal Co. was going to retire from all business of handling and selling coal. Everything it had, therefore, was to be taken over by the Sales Co. (R., 1909). It seems these leases were on printed forms in use for many years and contained covenants requiring the dealers to buy their coal of the lessor. Apparently the Coal Co. had furnished accommodation to local dealers in some places on this understanding at one time, but this covenant was not observed, was really a dead letter, and as far as this defendant is concerned, has never been enforced (R., 1975). *Competitors sell to these dealers freely. They buy when, where and of whom they desire* (R., 1931). The tonnage is inconsequential at all these yards (R., 1853, Sales Ex. 25, p. 2501), and no attention has ever been paid to this provision (R., 1855). The Dalton lease (Govt. Ex. 63) is not now in existence; the premises were surrendered (R., 1877). If there be anything wrong in the provision, it is meaningless to-day. How could such a clause be enforced by the Sales Co.? The Coal Co. has no coal to sell these tenants. The provision, even if it ever had any value, dropped out automatically as soon as the leases were assigned.

d. *The criticism that the Sales Co. agreed to lease from the Coal Co. its storage plants, trestles, docks, etc., and other coal facilities at the rental of $180,000 a year, 4½ per cent. on the estimated value of the property, to be increased 4½ per cent. upon the cost of any additions or improvements made subsequently, and that such a lease was made.*

The provision in the contract was this: "The mining company shall lease and sublet to the Sales

Company contemporaneously herewith at a fair rental, and with provisions in the lease that the Sales Co. shall keep the said properties insured and in repair and with such other covenants and provisions as may be proper to protect the interests of the mining company" (Pet., 90). *That is somewhat different from the assertion of the petition* (p. 72). A lease was made (Govt. Ex. No. 4, Pet., p. 102 *et seq.*), but the rentals are quite different from the statement of the petition *and a very material part is left out.* The rental was to be $180,000 PLUS

1. All taxes levied on the premises and the improvements thereon, and the coal and other taxable personal property now or hereafter located thereon in all cases where the mining company if the lease had not been made would be obliged to pay such taxes (p. 103).

2. Repairs and renewals and all maintenance expenses were to be paid by the Sales Co. (105).

3. The Sales Co. was to keep the structures upon the premises in Schedule A and B (107) fully insured for the benefit of the Coal Co. in companies approved by the Coal Co. at the Sales Co.'s expense (105).

Elsewhere (Pet., 48 and 49) four of these leases are cited as evidencing discrimination, and that charge is answered under another head, the rentals are incorrectly stated there also, and it is said they are "at much less than their true rental value."

No evidence was offered by the Government counsel fixing "true rental values" or any standard of rental values. The actual rentals paid and expenditures made were shown to be nearly double the figures of the petition (Sales Co. Ex. 54, R., 2548).

At the time of the negotiations the Coal Co. was

the lessee from the Railroad of a storage plant at South Plainfield, N. J., and certain other facilities (R., 1246). Then it had constructed certain storage plants itself and facilities of different kinds which it either owned or leased from owners in various places in the country (see Schedule A, Pet., p. 107). In order to ascertain what would be a fair and equitable rental basis for the property, that the Coal Company theretofore held, either in fee or as lessee, to charge the Sales Company, Mr. Smith first called upon the Real Estate Department of the Railroad for a list of all the properties and obtained the views of the persons in charge of that Department as to what they considered would be a proper rental. He was not satisfied to rely entirely upon their judgment (R., 1250). Therefore he employed Mr. W. J. Wilgus, a consulting engineer, who had had many years of experience in railroad work, in charge of maintenance of way and terminals of several Western roads, and in the East of the New York Central, and who had been in private practice for several years, as an expert to make a valuation of these properties. The results of Mr. Wilgus' work appear in an appraisal made of each of the leased premises, land and structures (Sales Ex. No. 3, R., 2449). Mr. Wilgus testifies that his estimates of value were fair and accurate. He gives details as to the persons he associated with him who were experts in real estate and land values (R., 1179, 1210, 1211). *The rentals afterwards were based upon his recommendations as to values and as to the rentals to be provided for* (R., *1322*). The employment of Mr. Wilgus (R., 1177, 1179) and the adoption of his recommendations show that it was not the purpose to give the Sales Co. any preference (R., 1260) and makes

it perfectly clear that this matter, like all others in connection with the contract, was very carefully considered and the effort made to arrive at a fair and equitable rental basis (R., 1260, 1285). Mr. Wilgus completed his appraisement Dec. 26, 1911, and it is in evidence (Sales Ex. No. 3). Mr. Foster, the Real Estate Agent of the Railroad, testifies the Newark (Pioneer St.) trestle was rented at its true rental value (R., 1322), so also the coal trestle at Rochester, the Grand Street Jersey City trestle, and shows that the Lehigh Valley charges are higher than the Pennsylvania (R. R. Ex. 90). Our Exhibit No. 27 (R., 2502) shows the rentals and expenditures the Sales Co. incurred in 1913 on certain of the leased properties and No. 33 (R., 2505) shows this for the 10 months of 1912. No. 34 (R., 2506) shows rentals and expenditures (year 1913) for the other properties and No. 35 (R., 2507) shows this for the 10 months of 1912; these exhibits fully support our answer and show the unfairness of this charge. An attempt was made to show that these expenditures were not the normal yearly outlays, but this was not established, and it was shown that similar expenditures were to be expected each year; the character of the structures and the uses they are put to make necessary constant renewals and expenditures. In connection with this lease it is proper to note that since March 1, 1912, the Sales Co. has called upon the Coal Co. to provide additional facilities under the 4th paragraph of the lease (Pet., p. 104), viz., additional pocket capacity at the Water St. Yard, Syracuse, improvements at the Oswego Yard and an increase of the capacity at the Irvington Yard (R., 1978, R., 190). As to all additional facilities furnished by the Coal Co. the Sales Co. pays

additional rent strictly as provided for in the contract (R., 1985).

Cleveland, Columbus, Cincinnati & St. Louis Ry. Co. v. Hirsch, 204 Fed., 849 (Circuit Court of Appeals, 6th Circuit), was a suit in equity to set aside a lease under which Hirsch occupied certain of the company's land. The basis of the suit was that the rent reserve *was virtually nominal*, and that the transaction was a subterfuge which was intended to and did give to Hirsch an undue preference in violation of the Interstate Commerce Act. Warrington, *J.*, says (p. 853):

> "If a carrier of interstate freight permits a shipper to occupy any of its land, as here, as a means of either reducing or absorbing its published rates in such shipper's favor, the transaction is clearly violative of that provision of the Elkins Law which forbids the giving or receiving of any rebate, concession, or discrimination, in respect to the transportation of any property in interstate commerce. It is vain to say that this unduly deprives the carrier of any private right of property. Such a contention, and it is made here, fails to observe the direct connection between the use made of the property, through reduced rental, and the concession and discrimination made as to rates. * * * *This in no wise militates against the right of a carrier to let or permit the use of its property at a reasonable rental.*" (Italics ours.)

Our adversaries do not seem to understand what a storage plant is; this is evidenced by the table in their Brief (p. 135) where they associate the storage plant at South Plainfield with four trestles, coal yards and coal pockets at other places, and call them all storage plants. A storage plant is a place for the stocking of surplus coal for which for the time being there is no sale; it is not a facility

for holding coal from which it is sold, and the coal delivered to purchasers. The Grand Street Yard at Jersey City, the Pioneer Street trestle at Newark (R., 163), the coal trestle at Irvington (R., 164), called in this table storage plants, are samples of store rooms, so to speak, utilized by dealers in handling their trade. They are precisely like the long list of facilities the Railroad leases to shippers (Pet., 52-55), to any shipper of coal having use therefor, of which there are a great many along the line of all Railroads.

This record shows hundreds leased by Lehigh Valley Railroad to persons this defendant has no business dealings with (Rec., 156). It shows the practice of all roads—the D., L. & W., the New York Central, the Pennsylvania—to furnish such facilities. There is and can be no wrong in this. The table referred to above does not state the valuations accurately, or the rate per cent. up to Feb. 23d. accurately, but this is of no consequence as we are not concerned with the situation at that time.

In an effort to minimize the rentals of these same facilities since this defendant took possession of them March 1st, 1912, another table is made up (Brief, 136). The mathematics are just as bad—the rentals are not 6.12 but 6.41; the figures in the table will not permit of 6.12 as the average rent paid.

This was not a happy selection of a few of the leased properties out of those covered by the lease (Ex. 4, Pet., p. 104).

As all witnesses agree the rental basis to this defendant was a fair one, and as the Government offered nothing on the subject, the counsel on the other side are not in a position to argue the con-

trary, and their personal views (Brief, 136) are of no value.

e. *The criticism because the contract was made terminable upon the option of either party upon six months' notice, but otherwise was to continue for ten years (Pet., 72).*

This, it is asserted, shows the contract was not a *bona fide* transaction between separate corporations. It is submitted the insertion of this provision in the contract justifies no such inference but just the contrary. If the Coal Co. was not arranging a contract with a separate corporation and one it knew it would have no control of in any way, why the need of such a covenant? If the Sales Co. was always to be dominated by and subservient to the will of those who controlled the Railroad, and if the Coal Co. was a mere department of the Railroad, as the petition alleges, there was no need of any precautions or protection by either party to the contract. It was because everybody knew the Sales Co. was to be an absolutely independent concern (R., 1286), to be managed and controlled separately and exclusively for its own interests, it was thought fair to provide that either party could be relieved of its obligations if there arose good and sufficient cause. The dealings as between the Coal Company and the Sales Company involved a forecasting of the future (R., 1918). There was a reason therefore for the insertion in the contract of clauses to protect the Coal Company, and, indeed, the Sales Company. Mr. Smith says both parties desired to be in a position whereby if matters did not work out as they anticipated they would be free to take up any further adjustments which might be necessary with the other party (R., 1266). The reasonableness of

such a provision is clear. These parties were negotiating for a permanent deal fair to both sides. It was a forecast of the future and safeguards were thought essential. Either party might default in its obligations, might not satisfactorily to the other side carry out the deal.

Viewed from the standpoint of the Coal Co. it was vital to secure a customer alive to the necessity of providing markets for a very large production, the success or failure of the Coal Co. with its enormous obligations to lessors of its coal lands, with its thousands of employees, with its fixed charges, etc., was dependent upon its ability to provide for steady and continuous production at its mines. It was surrendering forever its selling department and all its "good will" and trade outlets in the several states where after years of effort it had secured a profitable business in merchandizing coal. It knew perfectly well either this concern or some other would always thereafter handle its product. What is there sinister, fraudulent or violative of law in the provision the effect of which was to provide that if the Sales Co. turned out unsatisfactory, or if there was need for modifications in the contract, the Coal Co. could terminate it? Does it not conclusively show that the intent of all parties was to divorce the Coal Co. from its interstate business, and does it also not reveal the purpose to properly protect the Coal Co. against a stranger, a separate concern, against, not probable, but certainly possible causes of complaint by the Coal Co.?

Viewed from the standpoint of the Sales Co. it, too, needed just such a provision. There were possibilities the Coal Co. might not prepare the coal satisfactorily, might raise questions and disputes about prices, might insist on deliveries otherwise

than as the contract called for; or might not furnish enough coal to enable the Sales Co. to meet its contracts of sale, a hundred possibilities can readily be conceived of. It was essential to the Sales Co., organized to be absolutely separate and to be under independent management, to be able to protect itself if need to.

While it was confidently expected the contract would continue in force ten years, contingencies might arise justifying either party exercising the option of cancellation. This was not to be permitted without a reasonable time to each party to take care of itself in view of the termination of the agreements. The conditions associated with mining, handling and selling upwards of 8,000,000 tons of coal presented a problem of great magnitude and involved necessarily a consideration of all possibilities.

f. The charge that the contract prevents the Railroad from freely fixing its rates (Pet., 73) and that the Railroad retains an interest in the commodity carried.

The charge that the effect of the 65 per cent. contract basis of payment, under the Government's theory that the Coal Company is not a distinct and separate organization, but a mere department of the Railroad, is to retain to the Railroad an interest in the coal during its transportation, the contract providing for payment "for all sizes above pea a sum equal to 65 per cent. of the general average free on board prices of these sizes at tide points at or near New York, etc." (Pet., 96).

In view of the finding of fact in the court below supported by the proofs, viz., that Lehigh Coal Co.

is a *bona fide* corporation separately managed and not a "department" of the Railroad, this charge as to the Coal Co. drops out, but whether in or out the charge is without foundation in fact.

Since an early time the prices paid for coal bought from producers in the anthracite region have been based upon a percentage of the current average selling prices of anthracite coal at tide water; this the petition itself asserts (p. 33). *It is not alone the coal purchased under the contract between the Coal Company and the Sales Company that may go to tide points, but the general average price of all anthracite shipped to tide that is utilized.* Less than 12 per cent. of the total coal handled by the Sales Company goes to tide (R., 1835), and much of this is not sold there (R., 1790). The freight rate therefore to tide could have no bearing under any theory upon 90 per cent. of the coal of the Sales Company. Then the 65 per cent. has only to do with the average price of the prepared sizes, perhaps 60 per cent. of total shipments to tide. The asserted association of freight rates to the contract cannot possibly have anything to do with more than 7 or 8 per cent. of the coal shipped by the Sales Company. It has, however, no such association with the prices to be paid.

This form of contract was examined by this Court in *U. S. v. Reading Co., 226 U. S. 324, 356 et seq.* and considered singly was not criticised. The ones involved in that proceeding were stricken down because they were made in concert and combination, not because of the contracts intrinsically. Afterwards certain of them made in severalty were upheld (228 U. S. 158 of proceedings in Circuit Court in conformity with directions of this Court).

Again these contracts (Pet., 74) furnish no barrier to the reduction of freight rates to tide—witness the *Meeker* case the Government counsel put into this record. How could the Railroad increase the freight rate if it wanted to? It was forbidden to restore the rate to the Wyoming region, in effect at the time the *Meeker* case was decided by the Interstate Commerce Commission, at the expiration of the period during which the lower rate was imposed by that body. New tariffs must pass the inspection of the Commission, and the Railroad must accept what it says. Docket 4914 was frequently referred to in the taking of the proofs in this case; this proceeding has resulted in an order reducing the freight rates to New York, effective April 1, 1916.

The freight rates are not shown to affect the prices. The new *Meeker* rate to tide had no such effect, and it is so stated in the record.

This defendant decides how much of its coal shall go to tide and alone determines the price it will accept for the coal so shipped, except as to the Markle coal, the prices for which are determined by the Markles.

In discussing the price in the Lackawanna contract, namely, sixty-five per cent. of the general average of all anthracite coal at tidewater points, this Court, speaking through Mr. Justice Lamar, said (238 U. S. 516-531):

> "By reason of the fact that the Railroad Company bought, mined and sold it (coal)—like any other dealer—it was interested in maintaining prices since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the Railroad Company was to receive sixty-five per cent. of the New York prices on the day the coal was loaded

in the cars. The higher the rate in New York the better for the seller. And by the contract the Railroad reserved the power which, when exercised, could not only curtail production but shipments, thus by decreasing the amount transported the supply in New York could be lessened. This would tend to raise New York prices and thus increase the sum the railroad was to receive."

The Sales Company was not dealing with the Railroad Company. It only touched the Sales Company at one point, namely as a carrier receiving the established rates for freight, regulated by the Interstate Commerce Commission at all times. Those freight rates, it appears in this record, as has been said, did not affect the tidewater prices. The Railroad has no control over the matter of freight rates and is subject, of course, to the rates fixed and established by the Interstate Commerce Commission. If the contract involved here was one between the Railroad and the Sales Company—and it is not—still it would make no difference whether it was better for the seller to have the rate higher in New York,—this because the seller has and can have nothing to do with the fixing of the prices in New York; it has and can have nothing to do with the routing of the coal, whether to New York or to other points. But more than all this, as Mr. Justice Lamar says, speaking of the Lackawanna contract: "By the contract the Railroad reserved the power which, when exercised, could not only curtail production but shipments." Of course we were not dealing with the railroad company but with the Coal Company, an entirely separate and *bona fide* corporation, *and the Coal Company reserved no such power to curtail production and has no such power under this contract.* It is

bound to furnish the Sales Company its entire production unless prevented by causes over which it has no control, and it is only in case it does this that the Sales Company is bound to confine its business to the Coal Company's products. If the Coal Company undertakes to exercise any option, as the Railroad Company had the right to do in the Lackawanna Case (238 U. S. 539), the Sales Company is at perfect liberty, under our contract, to purchase coal elsewhere and anywhere. The Lehigh Valley Coal Company, therefore, has not any power to do anything tending to raise New York prices and thus increase the sum the Railroad is to receive by way of freight. We ask especial consideration of our contract as to this matter so that the differentiation between this provision in the contract here and the one involved in the Lackawanna case may be recognized and considered.

g. The charge that because the Sales Company agreed under certain conditions to confine its business to the merchandising of the Coal Company's product, save as to certain sales and agency contracts, it amounts to an agreement in restraint of trade.

It is important to see precisely what the provision is. It reads as follows:

> *"So long as the mining company is ready and willing to deliver to sales company coal under this contract*, sales company shall sell no other coal or fuels for itself or for any other persons outside of that which will require to be sold to comply with the terms of the existing hereinbefore recited sales agency or other sales contracts of mining company" (Pet., p. 94).

The previous provisions of this paragraph of the contract have a distinct bearing upon the reasonableness of the above quoted provision and they are stated in the exact language of the contract (appearing upon the same page of the Petition):

> "Sixth. The sales company agrees to use its best efforts to develop trade and increase its sales and widen its markets for the coal, and the mining company agrees to use its best efforts to increase its production and deliveries to the sales company of said coal, whether from its own mines or the coal it may purchase. The mining company, however, shall be subject to no liability in case of a failure to supply the full demands of the sales company, if such demands shall be beyond the reasonable capacity of the mining company to produce or if the mining company shall be prevented, by reason of any strikes amongst its employees, or by reason of injury to its mines, breakers, works, buildings, fixtures, or facilities, or for other cause beyond its ability to control. If by reason of any strikes among the employees of the sales company, or by reason of injury to the works, buildings, fixtures, handling facilities, or other property of the sales company or any property of the railroad company or companies by which the coal is transported to markets, the sales company shall be unable to take the coal as herein agreed, the sales company shall not be liable for nonfulfillment of this agreement during the period of such disability; provided every reasonable effort be made by the sales company to remove such disability at the earliest practicable period. The purpose and intent of this contract is to insure all reasonable efforts on the part of the mining company to prepare and furnish to the sales company all the coal that it can reasonably arrange to deliver, either from its own mines or by purchase, and on the part of the sales company to give its undivided attention

to developing and increasing the sales of coal delivered to it in the future by the mining company such increase in quantity as it is hoped the mining company may be able to furnish and deliver."

This restrictive feature of the contract thus appears to be reciprocal and mutual and the restraint upon the Sales Co. is not greater than protection to the Coal Co. *Further, the moment the Coal Co. fails to deliver its product save when and as it is fairly excused by strikes and matters beyond its control, the Sales Co. can go into the market and purchase from other coal dealers as it sees fit.* The restriction was only "so long as the Mining Co. was ready and willing to deliver the product contracted for". The contract in no way permitted the Coal Co. in any arbitrary way to curtail product in or restrain the trade of the Sales Co. or prohibit the Sales Co. from buying from some one else either on the lines of the Railroad or elsewhere. In view of the tonnage to be handled if the Coal Co. lived up to its covenant obligation and in view of the obligations of the Sales Co. in all the matters the contract covered it was certainly a reasonable and businesslike thing to require the Sales Co. to devote its time to handling the Coal Co.'s coal. It was well understood it would require all of its energies to develop and hold a market for this large quantity of coal and to furnish a steady and continuous buyer month by month through the year.

The contract was for a period of years. It was expected and agreed that the Sales Co. would endeavor to develop new markets. The coal was not all of one quality or all from one region; this presented difficulties both of storage and merchandis-

ing, differing from all the other large anthracite producers. While this was true the Coal Co. was obligated to get out the coal and if possible increase the production and it could hold no whip hand over the Sales Co. There was to be no restraint of the business of the Sales Co. except at times when the Coal Co. was powerless to prevent it—due to strikes and accidents. The Sales Co., therefore, was sufficiently independent and a free agent to make the contract equitable, fair and lawful.

These restrictive provisions radically differ from those appearing in the Lackawanna contract considered by this Court in the case of the *United States* vs. *D., L. & W. R. R. Co.*, 238 U. S. 516. Compare them with ours hereinbefore recited.

In the third paragraph of that contract it is provided as follows:

> The amount of coal to be so delivered and sold to the buyer by the seller *shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire.* The buyer agrees that, except to enable it to comply with the terms of the existing hereinbefore recited sales agency and other sales contracts of the seller, in the event of the failure of the seller to sell it coal it will purchase all coal to be sold by it from the seller and will purchase no coal from any other person or corporation except with the written consent of the seller (Appendix to this brief).

Our contract it is submitted was reciprocal and mutual: the restraint upon one party was not greater than protection to the other party required. It conforms to the standard Mr. Justice Lamar

(238 U. S. p. 532) refers to in discussing this matter.

The Sixth paragraph of the Lackawanna contract reads as follows:

> 6. The buyer agrees that it will conduct the business of selling coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of coal mined by the seller and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit.

This is cited (534) by Justice Lamar as evidencing "such an interest in the coal as enabled it (the Lackawanna Railroad) to dictate to whom it should be sold even at unprofitable prices".

There is no such provision in our contract and nothing of a similar character. We have no provision of any kind, name or nature even suggesting any right of Lehigh Coal Co. to control our prices or have anything to do with the subject of prices.

Again this is not a contract between a dealer and producer holding a monopoly of the sale of a commodity either as a whole or within the territory tributary to a particular railroad.

The counsel for the Government seem to be laboring under a misapprehension as to what constitutes a monopoly of a product. In the Reading case (226 U. S.) they contended the larger Anthracite Railroads through their executives combined and conspired to create a monopoly. In effect they said it took the greater portion of all the anthracite roads to create the monopoly or at any rate those controlling over 70 per cent. of the pro-

duction. In the Lackawanna case (238 U. S.) they contended a single road authorized under its charter to mine and sell anthracite was a monopolist and in the present Reading case they contend it is a member of a monopolistic combination. In the instant case they contend Lehigh Valley Railroad is a monopolist acting with and through Lehigh Coal Co. How can there be so many monopolies of the same commodity? So far as the merchandizing of anthracite is concerned this defendant is a monopolist in no sense of the word as we understand the definition of the term monopoly.

> "Monopoly is the outcome of the practical cessation of effective business competition. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing business, not occurring as an incident to the orderly growth and development of one of them, one or a few corporations or persons acting in concert practically acquire power to control prices and smother competition."

This was the position of the Government in the *American Tobacco Co. case, 221 U. S., 106, 117.*

The essential idea of monopoly all authorities agree is *the ability to control prices.*

> *Noyes on Intercorporate Relations, 2d Ed., p. 712.*

In the *Standard Oil Case, 221 U. S. 1, 61,* this Court, speaking through the present Chief Justice, said that the words to monopolize as used in the Anti-Trust law are synonymous with restraint of trade. Assuming then that monopoly is

(*a*) the outcome of the practical cessation of effective business competition;

(*b*) that it involves the power to control prices, or assuming any other definition of monopoly we are familiar with, this defendant nowhere has a monopoly; nowhere does it suppress competition, and nowhere has it any power to accomplish this. It conclusively appears that the entire territory along the line of the Lehigh Valley Railroad is competitive, the coal of the Sales Co. being sold in competition with coal sold by other sellers of anthracite. There is nothing to show that at any point coal may not be sold by anybody and everybody on an equal basis with the coal of the Sales Co.; all these matters are covered in another place in detail. There is no smothering of competition, or domination of these markets (R., 1713, 2017, 2034, 1797, 1818, 1845, 1865, 1944 and other supporting references cited elsewhere).

The case of *U. S. v. Great Lakes Towing Co., 208 Fed. 745, Dist. Court, Ohio, Northern District,* is relied on by Counsel for the Government.

The Towing Co. case on its facts is so far removed from this proceeding as to require some explanation for its citation, and none appears. The Great Lakes Towing Syndicate was formed for the purpose of acquiring towing properties; through this syndicate the Great Lakes Towing Co. acquired all the properties of all the prominent towing operators at fourteen ports. Five other corporations were formed and used to purchase the towing and wrecking properties at both upper and lower lake ports; the policy and activities of each of them in all ports were always absolutely controlled by the Towing Co. A bitter rival at Buffalo owning eighteen tugs was bought up by the Towing Co. Another company organized there to take its place and keep up the fight was bought by the Towing Co.; *compe-*

tition was smothered, concessions were made to get business away from the opposition, and various other acts appeared showing that the express purpose of the organization was to eliminate and destroy competition by the employment of unusual and abnormal business methods. The Towing Co.'s object in employing the system of customers' exclusive contracts was clearly to make successful competition impossible (p. 743), *the letter of the president of the company plainly showing this.* In this case it is helpful to see that the Court in its opinion (p. 742) declares that

> "the sale of a business and the surrender of the good will pertaining thereto and an agreement thereunder within reasonable limitations as to time and territory not to enter into competition with the purchaser, *when made as part of the sale of a business,* and not as a device to control commerce, is not within the Federal Anti-Trust Law." (Italics ours.)

We cite *Cincinnati Packet Co. v. Bay, 200 U. S., 179, 184:* A case where there were reciprocally exclusive agreements. In delivering the opinion of the Court, Holmes, Justice, says:

> "A contract is not to be assumed to contemplate unlawful results unless a fair construction required it upon the established facts. * * * The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will" (p. 184).

He further says (p. 184):

> "there has been no intimation from any one, we believe, that such a contract made as part of a sale of a business and not as a device to control commerce would fall within the act" (the Anti-Trust Law). *"On the contrary, it has been suggested repeatedly that such a con-*

tract is not within the letter or spirit of the statute." (Italics ours.)

A feature of this contract worthy of mention as evidencing not only the large matters with which the Coal Co. had to deal but also the painstaking care to protect its interests, is the purchase of the book accounts, the bills receivable of the Coal Co. as of March 1st, 1912. These aggregated on that day $6,348,518.38. It was provided that the Sales Co. take them over just as they stood on the books as of that date (R., 1916), but to protect the Sales Co. it was agreed that the Coal Co. guarantee their collection (Pet., p. 92). As it turned out, the parties testify, the Coal Co. was obliged to pay considerable sums to the Sales Co. under its guaranty.

Then, too, there was advance insurance on coal properties, stocks and Eastern cargoes; the Sales Co. paid on this account sums aggregating $5,079.45. Bituminous coal in stock was bought; advances to salesmen returned to the Coal Co.

There was coal in transit too (R., 1916) to be provided for. It was provided that all this be taken over on the basis of the contract applied to the f. o. b. averages for February, and that all agree was fair and reasonable.

Certainly this contract was most carefully arranged; the best and fairest consideration experienced men could bring to bear was given everything.

This contract and lease were submitted to the Department of Justice (R., 1267) and with these papers in hand the comments were made in the report of the Attorney General for the year 1913 (R., 1267-8, 1272). That he was justified in saying that "the Railroad Co. and the Coal Co. seem to have parted in good faith with title to the coal

before transportation begins" is evident and the proofs show there is not a shadow of doubt about the *bona fides* of the matter.

Counsel for the Government submit the proposition that the phrases "dissociation in good faith" and "*bona fide* corporations," as used in the opinions of this court, do not refer merely or chiefly to the honesty or morality of the transaction, so that when they deny "dissociation in good faith" no reflection is thereby made upon the integrity of those concerned in the transaction. Upon this point Judge Hough says (225 Fed. 399, 402):

> "In other words, a body of men may be honest, moral, well-intentioned, and acting within the letter of the law, and yet be unable to resist conviction of monopoly and restraint of trade because they cannot, in 'good faith,' 'dissociate' the corporations which they control. The proposition is incredible; to my mind 'dissociation in good faith' requires no more than the lawful conduct of honest men."

An examination of the proofs, the acts of the Coal Co. and the Sales Co. and the contracts will disclose scrupulous care to avoid any just criticism as to all matters, to secure a fair equitable contract not in restraint of trade or furthering any monopoly and that it was accomplished. The further fact is overwhelmingly established, viz.: that this defendant is absolutely a separate and *bona fide* corporation, independently managed, officered and conducted.

4.

The charge that the Coal Co. lost money under the coal purchase contracts; that such as were in force March 1st, 1912, were carried out thereafter by this defendant; the facts as to these contracts and the transactions with respect to the coal produced by the vendors therein after their cancellation.

a. *The charge (Pet., 35) that the Coal Company lost money in handling them which was recouped by advances made by the Railroad Co.*

This is considered here because by indirection the Government may argue that the Sales Company lost money on them too, because as to a few of these contracts the 14th paragraph of the contract of March 1, 1912, required this defendant to carry them out. As far as this defendant is concerned the tonnage handled under these contracts was not large at any time, but the charge is disproven by the facts. Since an early time the prices paid for coal bought from producers in the anthracite region have been based upon a percentage of the current average selling price of anthracite coal at tide water. (The Petition asserts this p. 33). This did not mean the coal covered by the contract, because it was the average price of all coal selling at tide, and further because the purchased coal might all be sold elsewhere. It was simply a convenient method adopted to determine the prices to be paid at the mines, and while

the percentage paid was changed at different times, it was fixed in later years at a certain per cent. of the average prices received at tide evidenced by information furnished by a Bureau of Anthracite Mine Statistics, formerly Ruley's, later Armstrong's.

The charge rests on the erroneous assumption that *all or practically all the coal purchased was shipped to tide and sold there* (Pet., 35). It is upon this theory Government Exhibit 126 rests. But the contrary appears both as to the Coal Company and the Sales Company (R., 1818, 1835). As to the Sales Company less than 12 per cent. of all the coal it handles goes to tide, and a considerable proportion of that is for trans-shipment to New England points, and is not sold at tide. (See Sales Ex. 37, R., 2569, No. 1835, 37, R., 1847.) It is the least desirable market and most unprofitable.

b. *It is charged that notwithstanding those of such contracts (listed p. 35) to which the Coal Company was a party still in effect May 26, 1913, were ordered cancelled by decree of that date in the Reading case (226 U. S., 324), the Sales Company continues to purchase coal from substantially the same independent operators.*

The facts are that the Sales Company never had any dealings with over half the list. At the time the Sales Company entered into the contract of March 1, 1912, the mining company was a vendee under a few of them only (Pet., p. 99). The Sales Company agreed to assume all the obligations under such contracts on the part of the mining company (Pet., 100). These contracts were with Coxe

Bros. & Co., Inc., Mt. Lookout Coal Co., Forty Fort Coal Co., Raub Coal Co. and A. Pardee & Co. The Sales Company carried out the obligations of the Coal Company in these contracts until they were cancelled the end of May, 1913, in obedience to the decree above referred to, excepting the Raub Coal Co. contract, which was terminated earlier and a new deal made with that company January 1st, 1913 (R., 1923), varying from the 65 per cent. contract; and the contract with Pardee, which was abrogated and a new agency contract on a commission basis substituted January 1st, 1913 (R., 1922). June 1st, 1913, a temporary arrangement was made to buy the Coxe Bros. & Co., Inc., coal on the 65 per cent. prices from month to month (Govt. Ex. 112, R., 1919). As to Forty Fort and Mt. Lookout a verbal arrangement was made with the President of those companies on the same basis and terminable at will (R., 1920, 1921). None of the features of the 65 per cent. contracts condemned in the Reading case and recited in the petition (p. 34) remain in present contracts with the Sales Co. None are made in concert or combination with anybody else, the vice of the 65 per cent. contracts, as Lurton, *J.*, points out in the opinion in the Reading case, *and he says it was not even charged in that case these contracts considered severally were in restraint of trade* (226 U. S., 357). There has been no violation by this defendant in any respect of any decree of this Court and the charge was made without information as to the facts.

5.

The charge that the Railroad caused the Coal Co. to make the Markle contract (Govt. Ex. No. 1, Pet., p. 37) to monopolize the transportation and sale of anthracite coal produced along its line, which contract since March 1st, 1912, has been carried out by the Sales Co.

It is said this contract with the Coal Company now being carried out by the Sales Company, a very plain, businesslike document, making the Coal Company commission agents for this product, was entered into by the Coal Company at the dictation of the Railroad for the purpose of monopolizing the transportation and sale of anthracite produced on its line, and that the effect has been as intended to make the Coal Company the exclusive selling agent of the Markle coal, and to secure the transportation "almost" exclusively to the Railroad, thereby preventing competition. It seems there had been a former contract made in 1877 (*R.*, 1591) and this contract, very similar to the old one, with some modifications the Markles desired, was executed "as it was very much better to our (Markle's) business." The Markles were mining coal and wanted somebody to handle it, and this arrangement was regarded as mutually advantageous to the Coal Company and to Markles. There is not so much as a scratch of a pen between the Railroad and Markles requiring them to ship a pound of coal over its rails (*R.*, 1592). The ingenious counsel for the Government sought to imply that

the Markle Company's motives in entering into the contract were not to restrain trade, or monopolize the coal business (R., 1594) but they may have been the Railroad's, through its alleged dictation to the Coal Company. *There is not even a squint in the record that the Railroad had the remotest thing to do with making this contract or causing it to be made.* The Railroad owned the stock of the Coal Company, therefore every contract the officers of the Coal Company made in the course of its lawful business must have been dictated by the Railroad in some way or other, and with a sinister and unlawful purpose; this is the apparent argument to be made.

These Markle collieries were opened and developed long years ago. The Railroad constructed spur lines into the breakers to give them an outlet for their coal. It is the only railroad with tracks there that can serve these breakers. It is naturally, therefore, the initial carrier (R., 1417). Must some other railroad be built into this section and offer to take this coal to avoid this manifestly unwarranted charge of monopoly of carriage as a violation of some Federal law? The coal moves over Lehigh rails necessarily a few miles, as things are today and have been since 1877 anyway (R., 1414), then it can move over the Pennsylvania from Tombicken (R., 1415) if the shipper desires, or it can be carried by Lehigh Valley to Bethlehem and there moved via the Reading to Philadelphia, or it can be carried over Lehigh Valley rails wherever that road runs if the shipper so desires. The Markle Company coal is routed so as to most advantageously reach its consignees. The Markles are as independent shippers as any on the Railroad. *They are at all times the masters of the situation. They absolutely dictate*

and control prices, they supervise and are in touch with all the details of this contract. They are at liberty to decline to fill any order sent in by their sales agent.

There is not shown to be the slightest discrimination, favoritism or preference to the Railroad or by the Railroad in connection with carrying out the contract. The G. B. Markle Co. instituted proceedings against the Railroad, both as to freight rates to tide and the tariff of June 1, 1913 (R., 1600), 37 I. C. C. 441. No person can read the testimony of Mr. John Markle and accuse him of making a contract to restrain trade or prevent competition or to monopolize transportation (R., 1595).

As far as monopolizing the sale is concerned, the charge is shown groundless by the plain reading of the contract itself. When in addition to this the evidence of Mr. Skeele (whose testimony in a former case was put into the record), Mr. Markle's, Mr. Wilson's and Mr. Evans' is read, and there is not the slightest contradiction of it anywhere, it appears that the Markle's control over prices is absolute and complete, *and they have always insisted upon and secured a higher price for their coal than either the Coal Co. or the Sales Co. have ever obtained for their own coal.* The Markles have the monopoly in both transportation, markets and prices if there is any monopoly about this contract, or the conduct of the parties under it. The word monopoly is a misnomer when applied to this contract and to the inter-relations of the parties to it.

Is there any law against a large producer of anthracite making a deal with a large seller of that commodity, with offices established everywhere and an equipment of experienced and efficient salesmen who can advantageously handle his coal, on a com-

mission basis, of the nature of this plain and businesslike contract? Of course the Coal Company was made the exclusive selling agent; the contract says so. Its effect was, as petition says, to make it the exclusive selling agent. What's wrong about that? What torturing of a businesslike contract is to be indulged in to gratuitously assume there is some violation of law in that? If the Markles felt the Coal Company could most advantageously handle their product, can they not legitimately give the Coal Company the exclusive agency? This is done everywhere and constantly in all branches of merchandizing, from Pear's soap to automobiles.

As to competition, as this coal apparently is of a superior quality, or at any rate commands a higher price than all other anthracite, it is in a sense above competition.

There is no proof in the case that the Railroad secures all the transportation of this coal. If it did, however, if the treatment it gives the shipper is fair and equitable and not discriminatory, what's wrong about that? Any railroad that carries a pound of freight for A prevents another railroad from carrying that same pound of freight. There is no undue monopoly in transporting the Markle coal to whatever extent the rails of the Lehigh Valley carry it for the owners. *The Markle coal belongs to the Markles, not the second party to that contract, or the Sales Co. now carrying it out, at all times until sold by the commission merchants of G. B. Markle Co. wherever the customers are secured.* If the Sales Co. today found a customer for some of this product it must first obtain the approval of the Markles before the coal can be sold. All these matters appear in the record without any question as to any of them (R., 469).

The 5th clause of the contract as to curtailment of output (p. 83) does not amount to "a hill of beans" (R., 1605), never has been enforced and is a dead letter (R., 1606).

But under the contract is there any clause *giving the Coal Co.* the right to curtail or control the output? It is entirely misapprehended by the Government counsel. The paragraph covering the matter is the fifth (Pet., p. 83), which provides "that should the market at any time assume such a position that the product from the mines of the party of the first part *cannot be sold at prices, fixed or established as aforesaid by the party of the first part* (*G. B. Markle Co.*), the party of the second part may demand that the party of the first part shall" • • • "curtail the output," etc. That is to say, if the conditions of the market do not permit the commission agent to sell the entire output at the prices G. B. Markle Co. fix and absolutely control (the proofs in the case showing they are always higher than other anthracite, and the G. B. Markle Co. have always insisted on getting higher prices) the commission agent can say, hold up a while—we can't handle this coal at your prices—there is not sufficient demand for your coal at your prices to enable us to handle your maximum output.

In what respect does such a covenant disclose domination by the agent over the principal? Who is to determine when the output is to be curtailed? Clearly the G. B. Markle Co. have entire control of the situation.

To enable the Coal Company to retire from the business of handling and merchandizing coal, the carrying out of this Markle contract, as it had several years to run, was turned over to the Sales Company (R., 1261) with the tacit consent of the

Markle Company (R., 1598-1600). Since March 1, 1912, the Coal Company has had nothing to do with the contract in any way (R., 1615). The Markles give the closest supervision, instruct Sales Company as to prices (R., 1841) to quote (R., 1841), send their representatives at times to Sales Company's agencies. The coal is sold at a higher price than any other coal handled by the Sales Company (R., 468). It is perfectly idle to talk about the Railroad or the Coal Company or the Sales Company securing by this contract any monopoly in sale of coal under this state of facts, and it is just as idle to argue monopoly of transportation. The transportation is by the route most convenient and advantageous to reach customers (R., 1842). The Sales Company is paid a commission for handling this coal; this coal amounts to about 10 per cent. of all its coal; it is handled of course very cheaply (R., 1794-5) in connection with the Sales Company's other large tonnage; there is no separation in matters of expenses in handling the Markle coal on Sales Company books, and it would be a difficult matter to estimate the profits (R., 248-1797). The counsel for the Government desired such an estimate made and it was furnished them (Ex. 23). The Auditor explains how the estimated profits were arrived at (R., 1788-1791); the statement includes everything except handling (R., 1797. Whatever the Sales Company has made out of this contract, much or little, and it is hard to estimate it accurately, although this was attempted at the request of Government counsel, can have no significance or bearing upon the *bona fides* of this defendant's separate existence, or of its contracts or its dealings with the Coal Company.

6.

The Lehigh Valley Coal Sales Company is an absolutely independent corporation in organization, management and control; its transactions throughout establish its integrity and *bona fides.*

This defendant is a lawfully organized and a lawfully conducted corporation with no strings tying it to any other concern, with no domination over it by any other corporation, and this record is without proofs to sustain the charges that it was intended to be or is a "tool" of the Lehigh Valley Railroad, or any other corporation or person. We confidently assert there is not the slightest evidence to show any abuse of its stock ownership or any use of this defendant as a mask or cloak or a scheme to violate any law.

It is proposed to establish this by references to the proofs somewhat in detail.

1. *A word as to the Directorate.*

Mention has already been made of Mr. Skeele and the very natural reasons why he was made its first President, as well as Mr. Wilson, and why he was selected as its Vice-President and Secretary. As to the directors, Mr. Skeele selected them all. Who were they? Mr. Thomas W. Lamont was a member of the firm of Messrs. J. P. Morgan & Company; Mr. Evans, another, had been the Assistant General Sales Agent, associated with Mr. Skeele in his work. Mr. Paul Moore was a lawyer in New York associated with the firm of O'Brien, Board-

man & Platt; Mr. Francis L. Hine was President of the First National Bank (R., 1939); Mr. Horatio G. Lloyd, a member of the firm of Drexel & Company, and Mr. Lyman D. Smith was a gentleman of experience in financial and accounting matters. It was essential that the new organization should have credit as well as capital and it was very natural for Mr. Skeele to try to secure on his board of directors gentlemen associated with large financial institutions from whom it was to be expected the Company would have to borrow at times large sums of money. *Every one of these gentlemen were men of high standing, business experience and probity of character* (R., 1260). *Not one of these gentlemen was ever a Director of the Railroad.* Mr. Skeele, the first Sales Company President, severed his relations with the Coal Company prior to March 1st, 1912 (R., 175), resigned his Directorship therein and from that date to his death in September, 1912, devoted his entire time exclusively to Sales Company affairs, as all the officers do (R., 2050). Mr. Wilson, the successor of Mr. Skeele, testifies to the meetings of the Board and to the conduct of the business (R., 2051). Mr. Wilson has attended all but one meeting of the Directors of the Sales Company since its organization. He personally devotes his entire time to its business and has been in close touch with its affairs. The business is run for the benefit solely of the Sales Company. The interests of that company are first in the minds of the Directors (R., 1928). There never has been the slightest effort on the part of any other outside concern either to dominate the affairs or to attempt to do it (R., 1857). The business is conducted as any legitimate business concern is, absolutely independent of any

other. *The proxies of the stockholders at annual meetings are given to Messrs. Wilson, Lloyd and Hine. Not one of these gentlemen is associated with the Railroad management as an officer, director or in any other way* (R., 624).

Starting with the charter (Sales Co. Ex. No. 5, R., 2451), note the care taken in each successive step not only to insure conformity to law but to safeguard the interests of all stockholders and insure the success of the enterprise for them, Sales Exhibit No. 6 (R., 2458), No. 7 (R., 2460), No. 8 (R., 2464), No. 9 (R., 2465), No. 12 (R., 2478).

2. *The means used to insure continuance of trade and to enlarge it.*

At the outset steps were taken to acquaint the trade with the entry into business of the Sales Company (Sales Ex. 39, R., 2524) by circulars and in the trade journals.

To advertise its coal and secure markets for the brands of anthracite it was selling and handling (R., 1836), it adopted a sort of a trade mark (R., 1833), a black diamond in a red field in a rectangular block with the name Lehigh Valley Coal Sales Company printed at the bottom (Govt. Ex., 59). This our adversaries offer in evidence, *omitting, however, in the description the printed name* (R., 239). Nobody else has such a trade mark, certainly the Railroad's is not like it (Sales Ex. No. 2, R., 2448). It is a very customary thing for coal sales companies to adopt devices and brands for their coal to individualize them and create and maintain a "good will." The advertisements we offered showed this (Sales Ex. 46 and 47). Energetic efforts have been made to improve conditions in the New England markets and to de-

velop the trade in the Western markets (R., 1833, 1835, 38 and 57).

Since March 1st, 1912, the Coal Company has ceased all shipments of anthracite, and sells and delivers its product at the mines in Pennsylvania, and title passes there (R., 1612) to the Sales Co. Armstrong submits the general average prices of anthracite at tide (R., 278), the Sales Company sending him each month its average prices. The Coal Company receives the Armstrong figures also and upon them the settlements are made for the coal purchased the preceding month, as the contract of March 1st, 1912, provides.

3. *The offices at 90 West Street, New York.*

When the Sales Company was organized the Coal Company was a tenant of certain offices at 90 West Street, New York City, occupying the greater part of the 9th floor. The lease was assigned to the Sales Company as it had some time to run (R., 1758). The Coal Company was a sub-lessee of a few rooms until May, 1913 (R., 174), with which the Sales Company had nothing to do. The rent paid by the Coal Company to the Sales Company during this time was $214 monthly (R., 180, 1758). *This rental was more per square foot than the Sales Company paid per square foot to the owners of the building* (R., 1759). Nothing could be more businesslike than this and it certainly justifies no criticism.

4. *The charge that the Sales Company is and must always be subservient to the will and direction of those who control the Railroad. "Such persons have always constituted its dominant stockholders and probably always will, they elect or*

dictate its officers or directors and through them determine its policies" (Pet., p. 73).

This quoted statement from the petition is nothing but an argument unsupported, by any facts, even in averment.

a. *The law as to corporations in which a majority of the stock is held by the same group of persons; there is no illegality in such a situation or presumption of "oneness" of the two companies. The decision in the Lackawanna case disposes of this charge against the Government's contention.*

If it be conceded that the "dominant" stockholders of the Railroad and the Sales Company are the same group of persons, does it follow that the Sales Company will therefore always be subservient to the will of those who control the Railroad? Is it to be assumed, without supporting proof, that the stockholders in control of the Sales Company will abuse their power to make it a mere tool and instrumentality of the Railroad? May not men be controlling stockholders of two independent and separate corporations without the charge being made that they are running one for the benefit of the other and to the disadvantage of minority stockholding interests? Is it to be assumed they will commingle the affairs of both so as to make the Sales Company a mere department of the Railroad? This charge is not only a step, and a long one, ahead of any decision or authority, legislative or judicial, but is contrary to the rule of reason, common sense and the business experience of all men. It is a reflection, too, on men of the highest standing and integrity, not justified as an unsupported assertion in this case.

The charge is without the slightest foundation in fact and nothing appears in the record supporting

it. Some small and inconsequential matters are urged as evidencing oneness, they are referred to in appropriate places associated with the Sales Company's transactions, under separate heads, and answered. They amount to nothing and establish nothing as make weights for the argument.

The case here is the mere existence of the relation, or the right growing out of the lawful ownership of stock not the abuse of that relation and that right. *Moreover, it is not the ownership of Sales stock by the Railroad as it never subscribed for or owned a single share.*

This charge that the persons constituting the dominant stockholders of the Railroad also constitute the dominant stockholders of the Sales Company was one of the charges in the Lackawanna case to prove lack of dissociation in good faith by the Railroad from interest, direct or indirect, in the transportation of anthracite. It was the subject of consideration by this court in that controversy. Mr. Justice Lamar, in speaking of that matter (238 U. S. at p. 527), after referring to the decision in the first Commodity case to the effect that mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier, says:

> "For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the Railroad Company."

He proceeds to show that in the Hepburn Act there was no intention on the part of Congress to confiscate property or to destroy the interest of the stockholders. Further speaking of the situation in which the Lackawanna Railroad found itself after

the adoption of the Commodity Clause, and stating it was natural, if not necessary, to organize a corporation with which a contract could be made and out of the cash received or stock issued to pay for or preserve the equity which the Railroad Company's shareholders had in the coal, he says:

> "In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances in which the law recognizes that there may be diversity of corporate interest even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public, the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review."

We add (and of this there can be no doubt under the proof in this case), that there is no unity of management in officers or offices or direction or control as between Lehigh Valley Railroad and this defendant, or as between Lehigh Valley Coal Company and this defendant.

The decision in the *Lackawanna* case, therefore, so far as this question of stock holding is concerned, it is submitted, disposes of the charge that the Sales Company is and must always be subservient to the will and direction of those who control the Rail-

road, because such persons have always constituted its dominant stockholders, etc.

There but remains to examine whether the Sales Company is a mere instrumentality or adjunct of the Railroad Company.

In the first place it is to be observed that the Railroad is not a stockholder in the Sales Company. The stock is owned by individuals and is freely alienable, and as matter of fact is changing hands continually.

If some person owns stock in both the Railroad and the Sales Company, that is their constitutional and inalienable right of which they cannot be deprived. It is one of the most sacred rights of the individual, and classed with the right of life and liberty, to have the right of *property* protected. An individual has the right to own stock in two or more different corporations and to exercise all the powers which such stockholding gives him, and this is a right of which he cannot be deprived.

So, even if some of the capital stock of the Sales Company is owned by the same persons as own the stock of the Railroad, no conclusion favorable to the Government can be drawn from that circumstance.

The true question to be determined is quite different and may be stated thus: "Is the Sales Company the mere agent or tool of the Railroad Company?" The record completely answers this question; *neither in work, profit, interest, or official personnel is there any identity between the Railroad Co. and the Sales Co.*

The cases where it has been held that this exception applies are very different from this case.

In the *Interstate Tel. Co. v. Baltimore & Ohio Telephone Co., 51 Fed., 49,* it was clearly shown

that the Baltimore & Ohio R. R. Co. owned the entire system and caused the Baltimore & Ohio Telephone Co. to be incorporated and to make the contract with the plaintiff, the Interstate Telephone Co. Afterward the B. & O. R. R. Co. sold out its entire telegraph business to the Western Union and of course it was properly held that the B. & O. Tel. Co. was but an agency of the B. & O. R. R. Co. How different is that case upon its facts from this case?

And in *U. S.* v. *Milwaukee Refrigerator Transit Co., 142 Fed., 247*, where the Pabst Brewing Company had the Refrigerator Company organized specifically as a device to cover the receiving of rebates, concessions and discriminations whereby the product of the Pabst Brewing Company could be carried at less than the public rate, the mere statement of the purpose is sufficient to show the vital distinction which exists between the situation of the L. V. Coal Sales Company, the defendant here, and the unlawful agency by which the Pabst Brewing Company undertook to evade the laws concerning rebates.

The case of *Lehigh Mining & Mfg. Co.* vs. *Kelly, 160 U. S., 372*, in no way sustains the Government's contention. Here a Virginia corporation claimed title to certain lands in Virginia which were in the possession of citizens of that commonwealth. The stockholders and incorporators of the Virginia corporation organized a Pennsylvania corporation, to which the Virginia corporation conveyed all of its right, title and interest in the Virginia lands without any valuable consideration. Stockholders in both corporations were identical. The Court held that the Pennsylvania corporation was a mere mask assumed by the stockholders of the Virginia

corporation for the purpose of invoking the jurisdiction of the federal courts and that this was a fraud upon the law which the court would not permit to be made effective.

b. *The stockholdings show no "practical identity" between the Railroad and the Sales Company; the proofs show the stock is actively dealt in and every facility is furnished stockholders to sell and dispose of their stock; the frequent changes and the classification of present stockholders.*

The Government offered list of stockholders of the Railroad as of March 28, 1914, and the Sales Company's stock list as of April 9, 1914, and made certain comparisons therefrom, offered as a tabulation (Govt. Ex. 123), (R., 520). The expert witness found that the

50 largest stockholders of the Railroad held 431,722 out of 1,210,034 shares.
50 largest stockholders of the Sales Co. held 47,108 shares out of 150,850 shares.
5 largest stockholders of R. R. held 143,400 out of 1,210,034 shares.
5 largest of Sales Co. held 22,497 shares out of 150,850 shares.

This means that the 50 largest stockholders of Railroad held about 1/3 of its capital stock and less than 1/3 of the capital stock of Sales Company. *Assuming these are the dominant stockholders of both corporations, these figures show they control neither.*

Another group of fifty large stockholders of the Sales Company could readily be named, composed of entirely different persons from those shown in the Government Exhibit, and whose stock holdings

would almost approximate those mentioned in that exhibit.

This "grouping" of stockholders could be continued indefinitely, each "group" owning a large proportion of stock, but that would not imply that the stockholders so singled out have any connection or interest in common, as they naturally are strangers to each other, and are scattered throughout the country.

Let us see what the record discloses as to this matter of stockholding. Mr. Burton, the Secretary of the Sales Co., made some comparisons of these same lists. As to the Directors of the Sales Company, Mr. Evans owns no stock in the Railroad; owns 2 shares of Sales Company stock. Mr. Hine owns 2,000 shares of Railroad stock, owns 450 shares of Sales Company stock. Mr. Lamont owns no shares of Railroad stock, 375 shares of Sales Company stock. Mr. Lloyd owns no shares of Railroad stock; owns 250 shares of Sales Company stock. Mr. Paul Moore owns 1,100 shares of Railroad Company stock and owns 516 shares of Sales Company. Mr. Smith owns 10 shares of Railroad Company stock and owns 12 shares of sales Company stock. Mr. Wilson owns no shares of Railroad Company stock and owns 2 shares of Sales Company stock. Of the 7 Directors of the Sales Company 4 own no stock in the Railroad; all own stock in Sales Company (R., 2041-2042). Mr. Lamont is connected with J. P. Morgan & Company (R., 2042). The firm of J. P. Morgan & Company owns 2,000 shares of Railroad stock and the firm owns 125 shares of Sales Company stock. Mr. Lloyd is connected with the firm of Drexel & Company. Drexel & Company own 2,350 shares of

Railroad stock and 1,202 shares of Sales Company stock.

The Directors of the Railroad named (R., 2043). E. T. Stotesbury owns 10,000 shares of Railroad stock and 1,102 of Coal Sales Company stock. D. G. Reid, 40,000 shares of Railroad and 5,000 shares of Sales Company. Charles Steele, 150 shares of Railroad, no shares of Sales Company. Abram Nesbitt, 750 shares of Railroad and 93 shares of Coal Sales Company. George F. Baker, 22,500 shares of Railroad and 3,375 shares Sales Company. George F. Baer, 15 shares Railroad, no shares Sales Company. Edward B. Smith, 500 shares Railroad, no shares Sales Company. William H. Moore, 40,000 shares Railroad, 6,250 shares Sales Company. Edward S. Moore, 1,900 shares Railroad, 175 Sales Company. William R. Butler, 127 shares of Railroad, 16 shares Sales Company. Henry B. Coxe, 10 shares Railroad, no shares Sales Company. Fred M. Kirby, 500 shares Railroad, no shares Sales Company. Mr. Stotesbury is connected with the firm of Drexel & Company (R., 2044). Edward B. Smith & Company held 3,065 shares Railroad, 495 shares Sales Company. Of the 12 Directors named, 5 own no Sales Co. stock and the holdings of 3 others are very small. Mr. Thomas, the President of the Railroad, owns no Sales Company stock.

Mr. Storck, the Government expert, made some other deductions. April 11, 1914, there were 3,583 stockholders Sales Company; all except 490 were stockholders in the Railroad. Persons owning Railroad stock own 122,924 shares of Sales stock.

Storck found stockholders of Sales Company scattered in large number of different states (R., 530). Guardians, minors, executors, deceased persons, trust companies and large number of women

stockholders; one woman owns 4,000 shares of the Railroad; none of the Sales Co. stock.

Neither the railroad nor coal company ever subscribed or held a share of stock in Sales Company, nor did Coxe Bros. & Co., nor D. S. & S. R. R., nor G. B. Markle Company (R., 1746). The Directors of the Railroad own of its stock 116,452 shares; adding the stock of Mr. Thomas 150 shares and that of Mr. Smith 12 shares, the aggregate is 116,614 shares out of a total of 1,210,034 shares. The gentlemen alleged in the petition as controlling the policies of the Railroad own less than 1/10 of its capital and own about the same proportion of the Sales Company stock. The stockholding power of the men alleged to dictate the Railroad Company's policies is about 1/10 of its capital and not a single one of them is now, or has ever been a Director of the Sales Company.

Shortly after the organization of the Sales Company an application was made to list its stock on the New York Curb Market (R., 1740); the written application for this privilege is in evidence, Sales Co. Ex. No. 10, and the cost $100 was paid (R., 1742). The listing requirements included a transfer office for the stock in New York (R., 2470). This does not look much like an effort to interfere with or impair the free alienation of any or all the stock when and as desired by each and every stockholder. Extracts were read into the record from the Investors' Pocket Manual showing the low and high prices for Sales Company stock during 1913 (R., 1743). It has been fully and actively dealt in at all times; transfers are made constantly. *There is nothing to prevent every share of the stock changing hands and an entirely new group of persons obtaining control of its*

policies and management to-morrow. Sales Company Exhibit No. 11 (R., 2472) shows the curb quotations as published for July 9th, 1914, of Sales Company stock listed among industrials, and an extract from the *Evening Sun* of July 22d, 1914, showing the bid and asked price for the stock, was read into the record (R., 1744). As evidencing the distribution of the Sales Company stock by sales and transfers we put in the record a classification as of July 9, 1914 (Sales Ex. No. 13, R., 2480), showing ownership vested in bankers, brokers, benevolent, religious and charitable institutions, corporations, insurance companies, partnerships, law firms, National and State banks and Trust Companies—but not a share of Sales stock was ever subscribed for or purchased by the Rail road, the Coal Company, or G. B. Markle Company. An examination of this list (R., 2481-85) will show widely diversified holdings in this country and Europe.

To illustrate this still further, we put in the record a list of sundry large stockholders as of June 20, 1914 (Sales Ex. No. 14, R., 2486) and their holdings (March 28, 1914) in the Railroad, by which it appears that there are several large holders of Sales stock who own no Railroad stock at all. The free alienation of this stock and the changes in two years is shown in our Exhibit No. 15 (R., 2487-8). The notoriously free dealing in this stock is shown in the circular of the investment brokers, Messrs. C. H. Jones & Company, of Nov. 15, 1913 (Sales Ex. 17, R., 2491). Comparisons of stockholdings as between the Railroad and the Sales Company lists show that 58 per cent. of the Railroad stockholders did not own any Sales Company stock and 14.7 per cent. of the Sales Com-

pany stockholders held no Railroad stock (Sales Ex. No. 18, R., 2493). The changes in the stockholdings and the new stockholders in the Sales Company in percentages appear in Sales Exhibit No. 19 (R., 2494), the names and number of shares acquired by the new stockholders appearing in Sales Exhibit No. 38 (R., 2510-23), holding in the aggregate 28,793 shares. *This certainly is enough to disclose the integrity and independence of the defendant as an industrial concern in good standing everywhere.*

c. The payment of freights by the Sales Company and the method of handling the matter.

All freight charges are made in accordance with the published tariffs (R., 84). Bills are rendered four times a month and drafts are drawn (R., 413-14). In the Fall of 1912 the Sales Company owed the Railroad considerable sums for freight and there was some delay in paying them. At that time there was a practice to extend credit generally; about that time it was corrected. Railroad made the Sales Company pay the freight charges in arrears, and then arranged to send drafts therefor three or four times a month for previous week's shipments. Since that date Sales Company has paid its freight charges more promptly than most any other shipper (413). Morrison, General Auditor, L. V. R. R. Co., explains practice as to handling freights with Sales Company (414). The Sales Company is so large a shipper, and from so many different points, it would be impracticable to send a bill for every manifest and takes time to make up the statements (418). He complained to the Sales Company about their delay in paying freights in 1912 (419).

Other shippers, however, he says, are frequently delinquent in the same way (419). For all of 1913 and all of 1914 Sales Company acceptance of drafts is matter of a few days (420). The Railroad has had no occasion to complain of Sales Company payments of freight since January, 1913 (421). General practice of the Railroad to extend credit to persons entitled to credits for freights; sometimes weekly settlements agreed upon; sometimes a monthly settlement (422). The positive rule in the Accounting Department of the Railroad is that there shall be no discrimination to Sales Company or anybody else on the Railroad. If anything like that occurred, clerk would be discharged. No discriminations to Sales Company (422). Summers, General Auditor of Sales Company, says the freights are paid and handled by the Sales Company with the Lehigh Valley Railroad in the same manner as they handle their freight payments to other railroads (R., 1773). The slowest payer of freights to the Railroad is the Government itself (R., 1349). Demurrage charges are paid just like any other shipper. A statement of bills for demurrage is in the record (Sales Ex. No. 24, R., 2500) from March 1, 1912, to March 31, 1914, and it aggregates $1,422.00.

The cases cited in the Government Brief are all cases of complaints to the Interstate Commerce Commission; they are far from supporting the charge of discriminations to the Sales Co. under the undisputed facts in this record.

The Hocking Valley case, 210 Fed., 735, to illustrate, decides that the giving *of several months' credit* for the payment of freight charges *to one shipper pursuant to a contract antedating the shipments, while other shippers under the same circumstances were required to settle promptly after the*

end of each calendar month for freight shipped during that month, was a concession or discrimination in respect to transportation within the Elkins Act. It is difficult to see the pertinency of any such authority to the facts of this case.

There is nothing in the case at bar to show the extension of credits to this defendant in any other or different way than to others. All that can be said is that for some months of the period prior to January 1, 1913 (that is to say, the first few months after the entry into business by this defendant), the Railroad did not exact the prepayment of charges for the transportation of this defendant's coal (an impracticable thing to do in view of its shipments from so many places, and by so large a number of manifests), and that this defendant was slow in paying its freight bills, just as other shippers were slow.

d. *The alleged "disadvantage of the independents in facilities."*

By "independents" it is presumed the Government Counsel mean individual concerns and corporations like the Plymouth Coal Co., G. B. Markle Co., Meeker & Co. In what respect they are any more independent than this defendant, the record fails to disclose. All shippers are alike independent, and if they are not, the Interestate Commerce Commission is ready to put all shippers on an equality. The Government conjures up imaginary evils and cites the demurrage bills of this defendant, with shipments of millions of tons a year, with the demurrage bills of the Plymouth Coal Co. with shipments of small tonnages. This is an illustration of a very singular misconception of the facts, and of the legitimate inferences to be drawn therefrom; it amounts to nothing more or less than a

torturing and a twisting of certain items of evidence dissociated from others, and an attempt to draw deductions from such isolated facts reflecting upon this defendant and its relations with the Lehigh Valley Railroad. It is baldly asserted that the imaginary evils are real evils because of the small sums paid by this defendant as demurrage bills in contrast with the large sums paid by this shipper. Fairness in the consideration of the evidence we believe requires an entirely contrary conclusion.

By the contract of March 1st, 1912 (Pet., p. 93), the coal purchased by the Sales Company was to be delivered by the Mining Company f. o. b. cars at the mines from time to time as called for by the Sales Company. The Sales Company under this contract, as it provides, gives notice to the Coal Co. on the 25th of each month of the quantity, as nearly as practicable, the Sales Co. will require for the next month, and arranges to take the coal in as nearly equal daily or weekly quantities as the requirements of the market will permit. The Sales Company and the Mining Company are acting intelligently and reasonably in this matter. The result is that the Sales Company is able to comply with the tariffs of the Railroad generally, and is not called upon to pay large sums by way of demurrage bills. The evidence as to the Plymouth Coal Co., however, disclosed that it was in the habit of shipping to tide large quantities of coal, whether it had any customers there for the coal or not, and the Government witness (Kahn) frankly stated that it was the expectation of the Coal Co. that the Railroad Co. would furnish that company free storage, either in its cars or in bins at Perth Amboy, until such time as Kahn could find customers for the coal. The Government in adopting this un-

tenable position is contending that it is the duty of a railroad to allow a shipper of a commodity to ask for all the cars necessary to take his entire production, and then take care of this production, either in its cars or at storage places at terminal points, until the producer can develop trade enough to dispose of this tonnage. This is a fair sample of the theories of the Government in connection with its charges against the Sales Company. The common carrier, the Government says, is under the semi-judicial duty of holding the scales even between various shippers who compete with one another, and of rendering impartial service to all alike. Thereupon the Lehigh Valley Railroad is charged with restricting trade and fostering monopoly, and of being guilty of discrimination, because it asks the Plymouth Coal Co. to conform to the Railroad's published tariffs, and its rules and regulations *in precisely the same way it asks all other shippers;* and because it is not willing to act as a warehouse for the Plymouth Coal Co.'s commodity free of charge it is soberly contended that this is a discrimination in favor of this defendant.

A complete answer to the whole matter is the finding and order of the Interstate Commerce Commission upon the complaints of the Plymouth Coal Co. and G. B. Markle Co. *et al.*, as to discrimination (*36 I. C. C. 150, and 37 I. C. C. 511*) that the charge was not well founded and that the Railroad was justified in refusing free storage at Perth Amboy.

c. The Pennsylvania State tax on anthracite, imposed by Act of June 26, 1913 (Pamphlet Laws, p. 639), and the action of the Sales Company with reference thereto.

An effort was made to show something out of order, it is difficult to say just what in the con-

duct of the Sales Company in its dealings under the contract of March 1st, 1912, with reference to this tax. Apparently the counsel tried to show that this tax (2½ per cent. ad valorem) was added to the price to the customer, and absorbed by the Sales Company, although the Coal Company has to pay this tax if the Act is held constitutional, and this is evidence of oneness of the Coal Company and the Sales Company. The troubles in connection with this matter are shown (R., 1813, 1941); that it never was the purpose of the Sales Company to benefit by it in any way (R., 1895); whatever it was able to collect from its customers was turned over to the Coal Company (R., 1896). In brief, the Sales Company said to the Coal Company that they would endeavor to collect the tax, but as they were in active competition with other dealers they could not collect the tax arbitrarily. The understanding was that the Sales Company was to turn over to the Coal Company, as it had to pay the tax to the Commonwealth of Pennsylvania, as much as the Sales Company could secure from its customers, and whatever was collected was turned over to the Coal Company. April 1st, 1914, 10 cents was added to prepared sizes and 5 cents to small sizes, being found by computation that that was equivalent to 2½ per cent. on the valuation. Since that date the Sales Company in paying its bills to the Coal Company includes the tax specifically and recoups itself as best it can. The Sales Company receives no benefit from the tax but rather a disadvantage in its being a nuisance (R., 1942).

7.

The charge that the profits of the Sales Co. have been "enormous" (Pet., 72); the facts with regard to them justify no reflection on this defendant.

There is no charge of extortionate, or high and monopoly prices charged for coal in any markets. This criticism is a veiled suggestion of some impropriety in the results attained by the Sales Co. since its organization and entry into business life. There is a perfectly reasonable explanation of its profits, consistent with obedience to all the laws affecting interstate commerce and due to the state of the trade during the two years and upwards this defendant has been in business.

The capitalization was the minimum justified in starting out to handle its affairs (R., 1253, 1911), in fact was not sufficient to enable the Sales Co. to complete its purchases from the Coal Co. and it had to borrow the first month $1,000,000 from Drexel & Co. (R., 1259). Then no one dreamed in the winter months of 1911-12 of the suspension in mining that occurred throughout April and May (R., 1919). It was reasonably to be expected that the prices would drop April 1st, 50 cents a ton on prepared sizes, for that had been the custom for some years. The prospects for the first year as forecasted were rather gloomy. The winter was a mild one and large quantities of coal were being stocked by the Coal Co. during all these negotiations. On March 1st nearly a half million tons were purchased of coal in storage. The unexpected, however, happened, the miners "went out" April 1st and stayed out until nearly the end of May.

Not a pound of coal was mined during those weeks. Upon the settlement of the differences between the miners and the producers in the anthracite region, resulting in their securing an advance in wages, the prices were raised 25 cents a ton on prepared sizes, about 60 per cent. of all sizes made, the usual discount of 50 cents a ton in effect April 1st was not made (R., 1839), the demand exceeded the supply (R., 1924), the stocking plants were relieved, there was no occasion to bear the burden and expense of storing coal during the year 1912, an abnormal demand continued during the entire year, the business was therefore unusually profitable and it was a markedly successful year (R., 1840). Indeed the effect of all the happenings in the year 1912 was felt in the year 1913. Most of the profits over the dividends declared quarterly starting in October, 1912, at the rate of 10 per cent. per annum are to be attributed to the increase in price and the unusual demand in the year 1912 and 1913. There is no reason to suppose anything like such profits for the current year and coal in July last was being stocked owing to the lack of demand (R., 1840). In November, 1913, the Directors declared a dividend out of the surplus earnings of the company of 25 per cent. of the capital outstanding, then $6,000,000 in round numbers. This was not done, however, without a careful consideration of the matter by a committee (R., 1747) consisting of Messrs. Wilson, Lamont and Hine appointed by the Directors at the meeting of September 26th, 1913. The opportunity was given the stockholders to subscribe for and take the proposed new stock issue to the extent of their holdings (R., 1750). The authorized capital, it will be remembered, was $10,000,000, of which $6,000,000 in round numbers

was issued at the time of the organization. This privilege was exercised by practically all the stockholders, so that the result was to transfer a surplus liability into a capital stock liability (R., 1926). The increased prices fixed by Mr. Skeele, the President (R., 1857), in 1912 continue (R., 1924). The unusual trade conditions continued through a part of 1913 also. This abnormal demand and the increase in prices made the net earnings much larger than could have been anticipated. A few figures are interesting as bearing upon the charge of "enormous" profits. On a capitalization of $6,000,000 the Sales Co. did a business of over $40,000,000. The cash dividend of 25 per cent. on the capital was $1,500,000, that is, 3.75 per cent. of $40,000,000. The ordinary dividends at the rate of 10 per cent. per annum amount to but 1.5 per cent. of $40,000,000 (Sales Ex. No. 53, R., 2548). To be exact, the dividends paid are equivalent to less than 3 per cent. on the gross amount of business transacted as Exhibit 53 shows.

This criticism of profits, whatever they were, is unproductive of any value to sustain the Government's contentions in this case.

8.

Storage plants, coal trestles, docks, etc., the necessity therefor to large dealers; their construction and occupancy in no sense involve discriminations against other shippers.

Storage plants are essential to a company doing as large a business as the Sales Company (R., 1926). The reasons are these: At certain seasons the de-

mand slackens very perceptibly. At other seasons the demand is greater than the normal output of the mines. In order, therefore, to supply the trade in the times of great demand it is necessary to accumulate some stock as against the time when the demand will be greater than the production. At other times the demand for certain sizes will be very slack while as to other sizes it will be normal. Therefore, so as to produce and sell the normal quantity of certain sizes the surplus must be taken care of in other sizes (R., 1927). The contract of March 1st, 1912, required the Sales Company to take the entire product of the Coal Company's mines month by month, irrespective of whether the Sales Company could find markets for all the sizes month by month. The coal had to be taken and paid for the next month. Therefore, if there was no demand for a certain proportion of certain sizes, or of all of certain sizes, or of all of all sizes, the Sales Company had to take care of it (R., 1927). Storage plants are an added cost and expense to the transaction of the Sales Company's business (R., 1927). Storage plants are not essential to small companies as a rule (R., 1933). It is the universal practice for railroads to furnish storage plants and facilities for shippers if they are consequential enough in tonnage (R., 1933). The temporary advantage to a small shipper to have a storage plant is more than offset by the interest on the general investment running throughout the year, the repairs and other things making such plants expensive (R., 1985). Storage plants are of benefit to the producer. They operate, however, for the benefit of the public, and they are an expense to the Sales Company (R., 1980, 1985). There is always a loss in re-handling stored

coal, and it is a consequential item. The counsel on the other side seem to be under the impression there was something wrong and unfair and violative of law in these large companies maintaining storage plants. It is perfectly apparent they are not built and maintained, as they are a large item of expense, for any other reason than absolute necessity. No effort was made to show they were peculiar to this defendant or that they were not essential to take care of the trade and to successfully carry on so large a business. In the contract made between the D., L. & W. R. R. Co. and the D., L. & W. Coal Co., second clause (R., 2630, 31), there appears a long list of just such facilities and storage plants, that had been constructed and maintained, which by that contract were leased to the new Coal Co. It is a matter of common knowledge that these plants, trestles and facilities are imperatively necessary to enable the trading companies to do business. For the fiscal year 1913-14 we showed the four storage plants cost the Sales Co. as an additional item of expense in doing business an average of all plants of over 20 cents a ton; the exact figures as to South Plainfield being 19.76, Ransom 29.87, Hudsondale 18.95, and Wende 25.23 (Sales Ex. 30, R., 2503).

The South Plainfield mechanical storage plant is the only storage plant the property of the Railroad of all the plants leased from the Coal Company by this defendant. It was built many years ago (R., 126), leased to the Coal Company, operated by it until March 1, 1912, then sublet to the Sales Company on a rental basis, after the appraisal by Mr. Wilgus, the independent expert, perfectly fair and at a full figure (R., 1322). It is described in the record (R., 1843, 161). The routing clause in the

lease of February 23, 1912, has since been cancelled (R., 127). It has a capacity of over 300,000 tons. It is an enormous burden to the Sales Company, but is one so large a dealer must assume in the conduct of its business.

The Coal Company leased to the Sales Company certain other large storage plants at Ransom, Hudsondale, Wende, etc., and other facilities, coal trestles, retail yards and docks (Pet., 107); all at fair rentals. They are all absolutely essential to the business of handling and selling large quantities of anthracite. Up to 1913 the Railroad allowed unlimited dumpings at their plants, the limit is now five days, and the shipper must do its own dumping (R., 329). There are undoubtedly advantages to the Railroad in having large shippers store in transit (R., 341); it enables the Railroad to transport the coal at times when the weather is favorable rather than in the winter when weather conditions are heavy; it insures regular movement over the railroad rather than a large amount in a period when the consumption is heaviest, and the railroad most congested, and secures better efficiency of service (R., 341). From the standpoint of railroad it would be better for all shippers to maintain storage plants. An offer was made to Plymouth Coal Co. for land at South Plainfield (R., 342) on precisely the same terms that the railroad leased storage plant to Coal Company, now sublet to Sales Company. Our adversaries tried to show that these storage plants were an unlawful preference, advantage or discrimination to the Sales Company by questioning our witnesses (R., 1977), but the President of the Sales Company's reply was he did not consider owning or leasing a property by anybody discrimination, and did not consider it a dis-

crimination to lease to one shipper the only storage plant in existence along the line of the railroad. It would be a considerable advantage to a small shipper to be able to store his coal free and transfer it later to the point of ultimate delivery. Mr. Wilson said he would like to be able to store free too, but he could not do it. The Sales Company, while it has a certain privilege of re-shipping stored coal, also has the obligation of maintaining and bearing all the expense of the plant, which any other shipper is free to do if he will incur the expense of the investment (R., 1977). Certain leases of premises now occupied by the Sales Company were called to the attention of the Real Estate Agent of the Railroad (R., 157). Routing clauses originally in the printed forms used in their leases have since been eliminated (R., 128); *no attention, however, was paid to these clauses before that* (R., 110). There is not the slightest evidence anywhere in the record that this defendant has secured by means of its leasing of storage plants or other facilities any undue advantage, any unlawful discrimination, or any preferential treatment from the Railroad.

This defendant never had anything to do with the Obuck lease (Govt. Ex. 34) in any way.

The petition contains a long list of leaseholds (52-55), and it is contended the leasing of these facilities amounts to a discrimination in favor of the tenants as against other shippers. It has been the custom of railroads generally to furnish such facilities to large shippers, not of coal alone but any other commodity. As the tenants are free to route their coal as they please and buy from any producer they please, it is difficult to understand the reasonableness of the charge. As to this defendant

it sells some coal to some of these tenants, to others it sells none; the tenant deals with others handling anthracite (R., 1798, 1800, 1807, 1815, 1819, *et seq.*, 1845, 1946, 2034, 2002); the tenants buy from whom they please and in whatever quantities they desire. As to these leaseholds (Pet., 52-55) an interesting table is in the record (Sales Ex. 42, R., 2526 *et seq.*) showing those the defendant does business with, the estimated proportion sold tenants by other companies and opportunities to route coal by several railroads, and, what is more to the purpose, several other shippers testified that there were no discriminations they could discover and they were all in active competition with these tenants and with the Sales Co. in the markets generally.

9.

The charge as to monopoly of production, transportation and sale of anthracite and the domination of markets, the alleged effect of the "conspiracy" and the degree of control acquired. As to the past they are immaterial, though not proven, and as to the present situation the proofs refute these charges in their entirety.

It is charged (Par. VI) that the Railroad acquired a virtual monopoly of production, transportation and sale in interstate trade of the coal produced from lands along its line, that it completely dominates the markets along its line, and has the power to fix and does fix, without the check of competition, the prices at which coal is sold at such

points. The theory is that the Railroad uses this defendant as a mere tool and instrumentality, and controls its every act, its fixing of prices, its methods of transporting its coal, and determines who it shall sell to and who not. This defendant as an alleged conspirator is in effect charged with sharing in this so-called monopoly and domination of markets as it handles Markle's and Pardee & Co.'s coal, and the production of the Lehigh Valley Coal Co. and uses the Railroad in part to transport its anthracite coal from the mines to various points of destination.

We have already shown there are no contracts as between this defendant and anybody restraining anthracite trade; the contracts are rather intended to increase trade, not, however, by restraining the liberty of the customer to deal with others if he wishes to, or can do so with advantage to himself. If the contracts and the transactions of this defendant are illegal and in restraint of trade and if they constitute a monopoly under the Anti-Trust law, the Act may well be denominated an act to restrain legitimate enterprise and limit and qualify the ownership of property. Congress did not intend to limit the amount of capital a citizen should invest in any line of business or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not by illegal contracts or devices restrain others from pursuing the same business, or deprive the public from enjoying the free use of capital, skill and experience of competitors.

It is to be noted here, also, that it is not sufficient to charge an unlawful intent or to aver that a combination or a course of business is in restraint of trade, or a monopoly of trade in order to consti-

tute this crime; the record must furnish satisfying proofs of acts. What has this defendant to do with the acquisition of coal lands or the inter-relations of the Coal Co. and the Railroad prior to its organization and the making of the contracts of March 1st, 1912? We propose to treat the charge as of to-day. As to all the contentions, the Court below declined to make definite findings because they were regarded as immaterial to existing situations.

Judge Hough said (225 Fed. 403):

> "All of the matters referred to took place before the creation and entry into business of the Lehigh Valley Coal Sales Company, and, assuming all the allegations to be true, it is thought that even in an action under the Sherman Act an opportunity might well be afforded (as in criminal proceedings) for a *locus penitentiæ*."

What acts appear in the proofs disclosing such monopoly in transportation and sale and domination of markets?

Not a single witness was called by the Government who supports these charges; the proofs bristle with evidence refuting them. There never has been any attempt even to prevent other companies selling coal in the same territory and the Sales Co. has never used either unfair practices or improper business methods (R., 2005). Any retail dealer on the line of the Railroad can get the coal he wants (R., 2012) and he does not have to pay a higher price for it either (R., 2013). This is the testimony of Mr. Bertolet, Secretary of the Retail Coal Merchants Association (R., 2005). At all points the Sales Co. is in active competition with other shippers and dealers (R., 1809-1819, 1844, 1852). A large number of shippers over the

Lehigh Valley were called, Mr. Thorne (R., 1866), Mr. McTurk (R., 1845), Mr. Hill (R., 1944), Mr. Kishbaugh (R., 2034), Mr. Barr (R., 2045). They were associated with large producers; they sold at line points on the Railroads; they were in no way associated with either the Railroad or this defendant. They were not even interested by ownership of stock in either. *They unite in saying there is no monopoly, no domination, but everywhere keen competition and every opportunity for everybody who pleases to handle anthracite at all points without let or hindrance, and with equality of treatment by the Railroad, and no unfair business methods indulged in by this defendant.* At all places these shippers were able to get as good prices for their coal as the Sales Co. *and at some higher prices.* These dealers buy from any producer they desire to deal with; the freight rate of course is the same, as the published tariffs determine that, and they are strictly adhered to by the Railroad. Sales Co. Exhibit No. 22 (R., 2498) shows collieries along lines Lehigh Valley Railroad and tons shipped over Lehigh Valley and other railroads, none of the coal from which this defendant handles or sells. This shows a tonnage of 2,654,399 for the year 1912, the last year figures were available from the Bureau of Mines of Pennsylvania. The report of this Bureau for the same year shows collieries along lines of the Railroad shipping exclusively by it, none of the tonnage of which was ever purchased or handled by this defendant. The list and tonnages stated in our answer (R., Vol. 5, 117) were verified. Nothing can be made out of the contract of 1899 between the Railroad and the Coal Co. to ship its tonnage over the Railroad (Govt. Ex. 14) because, if ever enforced, it fell March 1st, 1912, as

the Coal Co. had no coal to ship thereafter; the contract lapsed that day and there is not a squint in the contract of March 1st, 1912, between the Lehigh Valley Coal Co. and this defendant, as to routing of coal by the Sales Co. over any Railroad. *Nobody undertakes to say how this defendant shall transport its coal. The Sales Co. directs the movement of the coal from the breaker until it reaches the numerous markets and customers in Pennsylvania and elsewhere, and the Railroad obeys its orders.*

The Superintendent of the Wyoming Division of the Railroad just recently put in a switch to get the large tonnage of the Kingston Coal Co., active competitors of this defendant (R., 1432), and the Lehigh Valley Railroad is now carrying that tonnage.

This defendant has no monopoly of the shipments of anthracite on that Railroad or any other (R., 1417-18).

The Government completely failing to show any domination of the markets anywhere, or to show any undue restraint of trade anywhere, or any suppressing of competition anywhere, it is said in the brief that "the independent operators of collieries on the line of the railroad are comparatively insignificant" (63). Whitney & Kemmerer have three or four thousand customers, handle several million tons a year, ship five or six hundred thousand tons a year on the Lehigh Valley Railroad (R., 1713), Weston-Dodson & Co. ship about 200,000 tons a year over the Lehigh Valley and about 60 per cent. of it is sold at line points (R., 2017). The Mill Creek Coal Co. ship about 75,000 tons a year over the Lehigh Valley, and practically sell all its tonnage at line points (R., 2034, 2037).

The Hazle Mountain Coal Co. ship about 100,000 tons a year over the Lehigh Valley Railroad, sometimes as high as 150,000 a year, and compete at line points (R., 1845, 1846, 1849). Thorne, Neale & Co. are in active competition at line points, shipping via Lehigh Valley (R., 1865-6). Plymouth Coal Co. are shippers over the Lehigh Valley Railroad of from fifty to seventy-five thousand tons a year (R., 569). Madeira Hill Co. ship from 100,000 to 200,000 tons a year over the Lehigh Valley, a larger part of their tonnage, however, being shipped over other lines, notwithstanding the fact that they are producers along the lines of the Lehigh Valley Railroad (R., 1944, 1947, 1949). They buy from ten to thirty thousand tons yearly from this defendant (R., 1950). These are a few samples from the testimony disproving the Government's charges not only as to the matter of domination of markets but also as to the "insignificance" of the competitive tonnage at line points. As bearing upon this see the testimony of L. A. Stem, Line Sales Agent of this defendant from Waverly to Round Brook (R., 1797, 1807, 1815, 1850, 1853); also the testimony of Mr. J. S. Hamilton, General Northern Sales Agent of this defendant, having charge of the line trade from Waverly, N. Y., to Buffalo (R., 1818, 1825). The testimony of these last two named witnesses shows that the volume of business of this defendant at all line points is not much if any larger than its competitors. The admission is frankly made in the Government brief (p. 66) that the other shippers on the railroad are able to get the prices asked at line points by this defendant; this certainly destroys the theory of domination of markets, taken in connection with the facts the record discloses as to competition

everywhere, aside from the evidence attention is called to in the immediately preceding pages of this brief.

It is not deemed necessary to recite the evidence in detail disproving these charges; attention is called to the evidence of the President, Vice-President and General Sales Agent of the Sales Co. and their field representatives (*vide*, R., 1856-60, 1929-40, 49, 50, 2002, 34, 46, 48).

Our Exhibit 42 (R., 2526) shows the facts as to leases enumerated in the Petition (R., Vol. 5, 33), the estimated amount of coal handled, the coal bought from Sales Co. and competitors, the Railroads having rates in effect to these places, and whether the Sales Co. sells the lessees any coal at all, and confirms our contention, viz., that there is no domination of markets by the Sales Co. or control of prices or of business.

From Buffalo to New York, and everywhere else, there is not only no domination or monopoly of sales but active, free competition. As there is no evidence to the contrary there is no necessity for further elaboration.

10.

The radical differences between the situation of the parties and the provisions of the contract under review in the Lackawanna case (238 U. S. 516) and the status of the parties and contract provisions to be considered here.

The Lackawanna Railroad was engaged in the fourfold business of mining, buying, transporting and selling coal.

The Lehigh Valley Railroad was engaged in the sole business, as a public carrier, of transporting anthracite coal.

The Lehigh Valley Coal Co. was engaged in the business of mining, buying and selling coal.

The Lehigh Valley Railroad owned the stock of the Lehigh Valley Coal Co., but at the time of the passage of the Commodities Clause and at the time of the transactions complained of in this case the Lehigh Valley Coal Co. was a separately managed, *bona fide* corporation, with its general offices at Wilkes-Barre, Pennsylvania, and the averments involved in the amended petition, the subject of consideration by this Court in the so-called Second Commodities Case (*United States* v. *Lehigh Valley*, *220 U. S. 257*), were not proven in this case. The Lehigh Valley Railroad had no interest, direct or indirect, within the meaning of the Commodities Clause as construed by this Court in the first Commodities Clause case (*United States* v. *Delaware & Hudson*, *213 U. S. 315*). The proofs disclose no commingling of affairs of the Lehigh Valley Railroad and the Lehigh Valley Coal Co. "as by necessary effect to make such affairs practically indistinguishable" and, therefore, cause both corporations to be one for all purposes. Lehigh Valley Railroad in no sense dominated the situation in the region tributary to its road so as to enable it to fix the price not only at which all the coal could be bought but at which it could be sold at the seaboard for consumption.

In the Lackawanna case the Railroad Co. decided to adopt a plan by which to divest itself of title after the coal had been mined but before transportation began.

In the case at bar the Lehigh Valley Coal Co. decided to confine its business to the production and sale of anthracite at its mines in the State of Pennsylvania.

In the Lackawanna case the Railroad Co. caused the Coal Co. to be incorporated, having officers and stockholders in common with the Railroad Co.

In the instant case the former General Sales Agent of the Coal Co. organized the Sales Co. and the only participation by the Lehigh Valley Railroad was a declaration of a dividend of ten per cent. in cash to its stockholders, giving the stockholders the opportunity to subscribe for the stock of the proposed Sales Co., Drexel and Co., Bankers, of Philadelphia, however, arranging to underwrite all stock not taken by stockholders of the Railroad.

The contract in the Lackawanna case was made between two corporations having a common management.

The officers of the Sales Co. were the men who had been in charge of the merchandising of the coal for the Coal Co., but they absolutely dissociated themselves from the Coal Company's service at the time of their entering into the employ of the Sales Co., and the Sales Co. established different offices. The directorate were men entirely dissociated from the Railroad.

In the Lackawanna case the Railroad did not go out of the mining and selling business but "when the coal was brought to the surface the Railroad Co. lost title by sale to the Coal Co. f. o. b. at the mines, and instantly regained possession as carrier. It retained that possession until delivery to the Coal Co. which subsequently paid therefor at the contract price" (536).

Here the contract was made, as we have stated, between the Coal Co. and the Sales Co. and the Coal Company's deliveries were made f. o. b. mines to the Sales Co. The Railroad took possession of this coal as carrier, it being routed to such points as the Sales Co. desired. There never was any return of possession by the carrier to the Coal Co. The possession was returned to the Sales Co. or to its consignees. The Railroad Co. had nothing whatever to do with the contract price and, of course, received no part thereof.

The manner of the organization of the Coal Co. in the Lackawanna case was not criticised. This Court says there was no impropriety in the Railroad Co. taking the preliminary steps of organizing such a corporation; that it was not illegal for the stockholders of the Railroad Co. to take stock in the Coal Co.

In the instant case, therefore, the fact that the Railroad Co. took the preliminary steps of organizing the Sales Co. and that a large proportion of the stockholders of the Railroad Co. availed themselves of the opportunity offered in the circular of the Railroad Co. to take stock in the Sales Co. cannot be regarded as improper, and in and of itself does not prevent the contracts under review here from being sustained as legal agreements.

This Court said, however, in the Lackawanna case that where companies situated as the Lackawanna Railroad and the Lackawanna Coal Co. were, that is to say, having a common management, undertake to make contracts which affect the interests of minor stockholders or of third persons or of the public, the fact of their unity of management must be considered in testing the

validity and *bona fides* of the contract under review (528).

That is not the situation here. Contracts were made between the Coal Co. and the Sales Co. These two companies have no unity of management, and this is not even charged in the petition in this case, much less evidenced in the proofs; it is not even true as between the Coal Co. and the Railroad Co.

This Court says in the Lackawanna case "this is not an instance of a coal road and a coal company both of which existed and had made contracts prior to the Commodities Clause, but a case where a coal company was created with the express purpose that with stockholders in common it should be a party to a contract intended to enable the Railroad Co. to meet the requirements of the Commodities Clause and at the same time continue the business of buying, mining, selling and transporting coal" (528).

In the case at bar it is an instance of a Coal Company existing long prior to the enactment of the Commodities Clause, stock of which was owned by a Railroad, making a contract with a Sales Company to buy its product at its mines.

In the Lackawanna case the Railroad had not parted with title to its coal lands, mines and mining machinery, as in some instances discussed in the first Commodities Clause Case where the ownership of the mines had passed completely from the Railroads to the Purchasing Companies and the coal property was no longer subject to the debts of the Railroad Companies.

In the instant case the Railroad had no title to the lands, mines and mining machinery and the coal property was not subject to the debts of the

Railroad Co. The coal lands, mines and mining machinery were acquired by the Coal Co. as a separate organization. The Court says in the Lackawanna case (referring to the first Commodities Case): "After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface when it was transported and when it was sold".

In the instant case there was an actual and legal separation of the interests of the Railroad Co. and the Coal Co. in the coal, for the Coal Co. was a separately managed, *bona fide* corporation, and the property of the Lehigh Coal Co. was in no possible sense subject to the debts of the Railroad Co., and the debts of the Coal Co. could never be collected from the Railroad Co.

In the Lackawanna case this Court assumes that the incorporation and organization of the Lackawanna Coal Co. was legal; that the election of Railroad officers as the first managers of the Coal Co. was not illegal; that as officers of the Railroad they could contract with themselves as officers of the Coal Co.; that at the time of the organization it was not unlawful for the Railroad Co. and the Coal Co. not only to have officers but offices in common, and finally that all these facts together did not establish an identity of corporate interest, but adds that these facts taken together are most significant. The additional fact is commented upon that the Railroad was under statutory disability as to hauling coal, making it necessary to carefully scrutinize the arrangement to determine whether it was a *bona fide* and lawful contract of sale or a means by which the Railroad, though parting with its legal title, retained an interest and control in what had been sold.

Compare this with the situation in the instant case. The Sales Co., it may be stated, was organized under the auspices of the Railroad Co., in no sense, however, to the extent under which the Lackawanna Coal Co. was organized under the auspices of the Lackawanna Railroad Co. There the securing of the capital for the Coal Co. was not arranged for by independent bankers who agreed to take such stock as the stockholders of the Railroad did not care to subscribe for, but the arrangement was such as to make it necessary for the stockholders of the Railroad Co. to take the stock of the proposed new Coal Co. in order to secure its entry into business. The auspices, therefore, in the Lackawanna case were comprehensive and essential to the creation of the Coal Co. In the instant case they were absolutely unessential. The Sales Co. would have been organized if not a single stockholder of the Railroad Co. availed himself of the opportunity to subscribe to its stock. At no time has a single director of the Railroad Co. been a director of the Sales Co. The only officer in common is Mr. Smith, one of the Vice-Presidents of the Railroad Co. in charge, however, exclusively of its accounting matters, who was asked by Mr. Skeele, the President of the Sales Co., to assist him in the financial matters of the new organization; again, the officers of the Lehigh Railroad did not contract with themselves as officers of the Sales Co., for there were no such officers in common; again, not only were the officers not in common but the offices were not in common; the Sales Co. offices were established at 90 West Street, and the Railroad offices were established at 143 Liberty Street; again, neither of the parties to the contracts attacked here are under a statutory disability as to

hauling coal. It cannot be contended that the contracts were arranged for as a means by which the Lehigh Railroad, though parting with the legal title, retained an interest and control in what had been sold. Of course it parted with no legal title to the coal lands, the mines or the mining machinery; it had no such title. This title was plainly and clearly vested in the Lehigh Coal Co.

The material provisions of the contract as they are summarized in the Lackawanna case (530), compared with the provisions in our contract; both the Lackawanna contract and ours are printed as an Appendix to this Brief:

a. The Railroad Co. agreed to sell and the Coal Co. agreed to buy all the coal mined or acquired by the Railroad Co. during the continuance of the contract.

In the instant case the Sales Co. agreed to buy and the Coal Co. agreed to sell all the coal mined by the Coal Co. during the continuance of the contract, as well as to transfer certain purchase contracts then in force and the sales agency contracts.

b. In the Lackawanna case the price for the more important commercial grades was to be 65 per cent. of the New York Price on the day of delivery.

In the instant case the price for the more important commercial grades was to be 65 per cent. not of the New York price received for the coal, the subject of the contract, but 65 per cent. of the average selling price of all anthracite coal going to New York, less certain allowances, diminishing each year and ending within the first half of the life of the contract. These allowances, as the evidence shows, were in view of the obligation of the Sales Co. to enlarge its trade and to enter into and

develop new markets to enable it to successfully handle and dispose of the Coal Company's entire production.

c. In the Lackawanna case the amount of coal to be sold and delivered was at the absolute option of the Railroad Co., as its interests might determine.

In the instant case there was no such agreement whatever. The agreement was that the Coal Co. was to sell and deliver to the Sales Co. its entire production, using its best efforts to increase it, subject to no relief in this matter other than the relief to be accorded it in case of strikes or other matters over which it could not have control.

d. In the Lackawanna case the Coal Co. was not to buy coal from any other person or corporation without the written consent of the Railroad Co.

In the instant case the Sales Co. agreed to buy coal from no other person or corporation so long as the Coal Co. furnished it its entire production, and in case it failed to do so the Sales Co. was free to buy coal from any other person or corporation.

e. In the Lackawanna case the Coal Co. was to conduct the sale of the coal so as to best conserve the interest, good-will and markets of the coal mined by the Railroad Co.

In the instant case the Sales Co. was to use its best endeavors to increase its markets so as to enable it to take the entire production of the Coal Co., but there was no provision that it was to conserve the interests of the Vendor in any way, shape or manner.

f. In the Lackawanna case the Coal Co. was to continue the orders of present responsible cus-

tomers of the Railroad Co., even if some of such sales might be unprofitable.

In the instant case there is no such provision in the contract; nowhere is there any obligation on the part of the Sales Co. as to prices it shall charge its customers—that is its own and exclusive business and nobody dictates to it in that or any other matter.

g. In the Lackawanna case the Railroad Co. leased to the Coal Co. all its trestles, docks, and shipping facilities at a rental of five per cent. of their value.

In the instant case the Coal Co. transferred to the Sales Co. its leases for such facilities as it had acquired from the Railroad and leased such as it owned itself; the rental value was determined after an appraisal by independent experts employed specially for that purpose; the basis of this rental amounted on an average to 6.41 per cent. of the appraised value,—a larger rental than in the Lackawanna case, a large rental than lessees paid the Pennsylvnia Railroad, and a rental which the undisputed evidence shows was fair to both parties.

h. In the Lackawanna case the contract went into effect on its date (Aug. 2nd, 1909), and it was provided that upon written notice by either party given prior to Aug. 1, 1910, of its intention to cancel it was to expire February 28, 1911, otherwise contract was to continue until expiration of six months after either party notified the other of its intention to cancel.

In instant case the contract was for the definite term of ten years from its date (March 1st, 1912), with right to either party to cancel on six months' written notice.

i. In the Lackawanna case this Court held that the contract was coupled with onerous and unusual provisions and recited them.

In the instant case the contract has no such onerous and unusual provisions; it is protective to one party no more than the other. A cursory examination of the contract here will disclose scrupulous care to protect each of the contracting parties,—one no more than the other,—and it discloses the normality of the contract, just such a contract might be made between parties trading at arm's length.

j. In the Lackawanna case it is said that by reason of the fact that the Railroad bought, mined and sold coal like any other dealer, it was interested in maintaining prices.

In the instant case the Railroad Co. had nothing whatever to do with the prices or with the contract, and even if the Railroad Co. had been the other contracting party with the Sales Co. it could not in any way control prices; the Coal Co. had nothing to do with fixing or determining Sales Co.'s prices.

k. In the Lackawanna case it is said that the Railroad could control prices because it reserved the power not only to curtail production but shipments.

The Lehigh Coal Co. reserved no such power and has no such power under the contract. The Lehigh Coal Co. cannot curtail production. It is bound and obligated to give to the Sales Co. its entire production, using its best efforts to increase it, and is only to be relieved of delivering its entire production in case matters arise over which it has no control. In all dealings in the Anthracite region such

a provision is absolutely essential to protect Vendor and Vendee. As a result of differences between miners and operators as to wages in 1912 there was a suspension of six weeks. If a similar suspension occurs in any year it will curtail production, but it would not affect the mutuality of the contract in consideration here if it lessen the deliveries to the Sales Co., because it would clearly be a matter beyond the control of the Coal Co. Supposing a colliery of the Coal Co. was temporarily put out of business by the mines being flooded or a fire occurring, requiring cessation of work,—all such matters are of such frequent occurrence in the Anthracite region as to make it essential in contracting for the sale of the production to provide for such exigencies; they in no sense show abnormality or a desire to restrain trade.

l. In the Lackawanna case the criticism of the basis of payment, to wit, a given percentage of the New York price, rests upon the power retained by the Railroad Co. to limit production, thus limiting transportation and thus raising New York prices and thus increasing the sum the Railroad is to receive.

There can be no criticism of this basis of payment in and of itself; to change it would require a revolution in all the dealings in the Anthracite region. It has been the basis of payment—that is to say a given percentage of the average of New York prices has been the basis of payment for over half a century. It is little understood on the outside, and it is constantly referred to by Government Counsel as evidencing some improper relation between the freight rate and the price at the mines.

This was so thoroughly dispelled in the Reading case (226 U. S.) as to not justify a lengthy discussion of the matter at this time. Inasmuch as the Interstate Commerce Commission regulate and control the freight rate absolutely and it is not within the power of the Railroad to change it, and inasmuch as it appears in this record that the lowering of the freight rate in the so-called Meeker case, as to coal coming from the Wyoming region, did not affect the price at tide, there is no room for the argument that the Railroad can change its freight rates and, therefore, add to the price at tide, or that even if it did that it would affect the price at tide. Over and above all this, however, less than 12 per cent. of the Sales Co.'s purchases goes to tide and, as demonstrated elsewhere in this brief, the matter, therefore, can only have to do with a very small proportion of the purchases: besides this the basis of payment is not a per cent. of the Sales Co.'s prices it receives at tidewater points, but 65 per cent. of the average prices received for all anthracite sold there.

m. In the Lackawanna case this Court said it was evident that the Coal Co. was neither an independent buyer nor a free agent.

In the instant case the Sales Co. is an independent buyer and is a free agent. It is not dependent solely upon the Coal Co. for the amount of coal it can procure and sell. If the Coal Co. does not live up to its agreement to give it its entire production, the Sales Co. has the right to purchase elsewhere, without the consent of the Coal Co.; the contract is only restrictive on this condition, is reciprocal and mutual, and the restriction upon one party is not greater than protection to the

other party requires. In the instant case the contracting parties studiously and in good faith avoided anything and everything, both in contract or conduct, that savored of joint action, joint interest, or the dominance of one company over the other.

The criticisms of the Lackawanna contract, therefore, cannot fairly be made of the contract here.

II.

The Decree of the District Court dismissing the Petition should be affirmed.

Respectfully submitted,

NICHOLAS W. HACKER,
Counsel for Lehigh Valley Coal Sales Company.

APPENDIX.

Contract between D., L. & W. R. R. Co. and D., L. & W. Coal Co. (R., 2568 *et seq.*).

"This contract, entered into this second day of August, 1909, between the Delaware, Lackawanna & Western Railroad Company, hereinafter called the 'seller,' of the first part, and the Delaware, Lackawanna & Western Coal Company, hereinafter called the 'buyer,' of the second part, witnesseth:

"Whereas, the seller is the owner of coal lands situated at various points in the counties of Luzerne and Lackawanna, and the state of Pennsylvania, and has been engaged both in mining the coal therefrom and in transporting to market and selling the same, and in like manner has so transported and sold large amounts of coal purchased by it in said state; and whereas, the seller, to so sell its coal, has constructed storage plants and trestles at various points in different states, and has entered into various sales agency contracts; and whereas, to so market said coal most of the same must be transported in interstate commerce, so that it has become necessary for the seller, in compliance with law, to sell all of its coal within the state of Pennsylvania; and whereas, the buyer is desirous of contracting to so purchase all of the seller's coal at its mines, to contract for the transportation of the same to market, and to sell the same and for such purpose to lease of the seller various of its storage plants, trestles, offices, and other facilities, and assume its selling agency contracts:

"Now, therefore, in consideration of the premises, and of the mutual covenants herein contained, it is agreed as follows:

"First. The seller agrees to sell to the buyer, and the buyer agrees to buy of the seller, all mined, marketable coal wherever situated now owned by

the seller, and either stored, held at various points, or in the course of transportation, except such coal as the seller elects to retain for its use in the conduct of its business as a common carrier. The buyer shall pay the seller therefor, in cash within thirty days from the date hereof, as follows, viz: For all of the coal in transit, at prices to include the full tariff charges of the seller and of all other carriers whose charges have been paid by the seller for the transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein, at prices prevailing for the month of July, 1909; for all coal stored, of all sizes, at points west and north of Buffalo, N. Y., the sum of five dollars and fifty cents ($5.50) per gross ton; for prepared sizes of coal stored at Buffalo and at other points along the lines of the owned, leased and controlled lines of the seller, the sum of four dollars ($4.00) per gross ton; for sizes smaller than prepared sizes so stored at Buffalo and points east, along the lines of the seller, not including that stored at or about the mines of the seller, the sum of one dollar ($1.00) per gross ton. The buyer shall also pay an equitable proportion of taxes for the year 1909 assessed or to be assessed against such stored coal.

"The buyer hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with the transportation or storage of said coal, and hereby assumes all risks and obligations in connection therewith from the beginning of the day of the date hereof.

"Second. The seller shall lease to the buyer contemporaneously herewith, the following properties: The Cheektowaga stocking plant, at Buffalo, N. Y.; the Port Morris storage plant, at Port Morris, N. J.; the Dover stocking plant, at Dover, N. J.; the Erie Street lake trestle, at Buffalo, N. Y.; the transfer trestle at East Buffalo, N. Y.; the lake shipping trestle, at Oswego, N. Y.; the canal trestle, Clinton Street trestle, and Geddes yard trestle at Syracuse, N. Y.; the canal trestle, at Utica, N. Y.;

the retail trestles located, respectively, at Newark, Harrison, Bloomfield, Summit, and Paterson, N. J.; the Division Street dock trestle at Chicago, Ill.; the Wabash dock trestle, at Toledo, Ohio. The rental to be paid the seller by the buyer for the use of said properties shall be five per cent. (5%) of their agreed value, including good will, and the leases shall provide that the buyer shall keep the said properties insured and in repair, and shall contain such other covenants as may be proper to protect the interests of the seller.

"The seller has leased certain of its trestles to different persons, as follows: The Main Street, Erie Street, Chicago Street, Seneca Street, Walden Avenue, and Black Rock trestle at Buffalo, N. Y., to E. L. Hedstrom; the McKinney trestle at Binghamton, N. Y., the Chemung Coal Company trestle at Elmira, N. Y., the Oswego Coal Company trestle at Oswego, N. Y., the Gilmore trestle at Utica, N. Y., the Horre trestle and elevator on pier 5, Hoboken, N. J., Burns Brothers' trestle on property of the seller at South Brooklyn, N. Y., the Klink trestle at Syracuse, N. Y., a coal trestle at Bath, N. Y., and various other trestles located on the lines of its owned, leased and controlled lines.

"The seller has also entered into sales agency contracts, as follows: With E. L. Hedstrom & Company, Chicago, Ill., S. C. Schenck, Toledo, Ohio, Northwestern Fuel Co., St. Paul, Minn., Milwaukee, Western Fuel Co., Milwaukee, Wis., E. L. Hedstrom, Buffalo, N. Y., and Ogdensburgh Coal & Towing Company, of Ogdensburgh, N. Y.

"All of such leases and sales agency contracts shall be taken over by the buyer as of the date hereof, on terms to be agreed upon, and it shall assume all obligations of the seller with respect thereto, and be entitled to the benefits thereof. The buyer also agrees to lease of the seller the coal sales office building at Buffalo and Syracuse, N. Y., rooms in the station of the seller at Scranton, Pa., and suitable quarters at 90 West Street, New York City.

"The seller will provide that any of the foregoing

properties so to be leased to the buyer which are owned by the Syracuse, Binghamton & New York Railroad Company shall be so leased to it by such corporation.

"The seller has also entered into contracts for the sale of coal for the current year with various customers. A schedule of such contracts shall be prepared and furnished to the buyer by the seller. All of such sales contracts shall be assumed by the buyer as of the date hereof, and it agrees to comply with the terms and conditions of such contracts. The buyer also agrees to assume the obligations of a certain contract entered into October 8, 1905, between Lucy A. Turner and the seller in connection with the business of Henry B. Turner Coal Company at foot of East 23d Street, New York, and shall be entitled to the benefits thereof without other consideration than that named herein.

"The seller has entered into a contract, dated June 17, 1905, expiring August 1, 1910, with the Solvay Process Company, of Syracuse, N. Y., providing for the sale of washery coal at prices named therein. It is understood that the buyer shall assume such contract and supply said company with coal at prices named therein. The seller, however, agrees that as the buyer cannot conform to the conditions of such contract without a material loss, it will adjust such loss with the buyer upon an equitable basis on terms to be agreed upon.

"Third. Subject to the conditions of this paragraph, and at the prices herein stated, the seller agrees, during the terms of this contract, to sell to the buyer all coal hereinafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase. The buyer agrees to purchase all such coal at such prices and to pay the seller therefor in cash on the 20th of each month for all coal delivered to it by the seller f. o. b. cars at the mines during the preceding month. The buyer also agrees on the 15th of each month to pay the seller in cash all tariff charges of its owned, leased, and controlled lines, and all moneys ad-

vanced by it to other carriers for the transportation of said coal during the preceding month.

"The amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire. The buyer agrees that, except to enable it to comply with the terms of the existing hereinbefore cited sales agency and other sales contracts of the seller, in the event of the failure of the seller to sell it coal, it will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller.

"The seller reserves the right to retain all coal required by it for the use of its owned, leased and controlled lines in the conduct of their business as common carriers; also such coal as it may desire to sell its employes at the breakers, the same not to be hauled in railroad cars.

The buyer agrees to pay the seller, and the seller agrees to accept from the buyer, the following prices for said coal, to be delivered f. o. b. railroad cars at the various breakers now located and hereinafter constructed by the seller at its mines aforesaid:

"For all sizes above pea coal, sixty-five (65) per cent. of the general average free on board prices of said sizes received at tide points at or near New York, between Perth Amboy and Edgewater.

"For pea coal, fifty (50) per cent. of the general average f. o. b. price for pea coal at said tide points at or near New York, when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the seller shall be increased one (1) per cent. until the percentage paid for pea coal reaches sixty-five (65) per cent.

"For buckwheat coal No. 1, forty (40) per cent. of the general f. o. b. price at said tide points at or

near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the seller shall be increased two (2) per cent. until the said f. o. b. price reaches two dollars and fifty cents ($2.50), after which the proportionate price paid the seller shall advance one (1) per cent. for each ten (10) cents advance in the f. o. b. price above two dollars and fifty cents ($2.50), as in the case of pea coal above mentioned: Provided, that nothing herein contained shall oblige the buyer to pay for buckwheat No. 1 coal a rate higher than for pea coal.

"For all sizes smaller than buckwheat No. 1, the seller shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

"The general average f. o. b. prices herein referred to shall be determined by the general average free on board prices received for the various sizes on general market sales thereof at tide points at or near New York between Perth Amboy and Edgewater during each calendar month, and a statement of such prices shall be furnished the buyer by the seller prior to the 8th day of each month subsequent to that in which such monthly sales shall have been made—the intent of this provision being to ascertain and to fix the market price of the coal at the mines as nearly as may be as of the several and respective days of delivery of the coal at the mines.

"Payment on the 20th day of each month for coal purchased during the preceding month shall be made at such prices.

"Fourth. The seller agrees that all its coal sold to the buyer shall be properly prepared for market in accordance with the past practice and standards of the seller.

"Fifth. The buyer agrees that at any transfer trestles leased to it by the seller it will transfer

from car to car any coal which the seller desires to have transferred, at a price to be agreed upon. It is also understood that the parties hereto shall adjust the charges to be paid by the buyer to the seller for coal forwarded to and unloaded from storage or stocking plants and with respect to other transportation charges to be subsequently covered by tariffs to be filed by the seller.

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable; it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit.

"Seventh. In the event of dispute as to tidewater prices or as to the proper interpretation of any provision of this agreement, or if by reason of changes in market conditions, tariff rates or otherwise, modifications or changes in this contract should fairly be made, and the parties hereto cannot agree with respect to such modifications or changes, or if the parties cannot agree as to any matter, it is agreed that all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the general sales agent of the buyer, and one person selected by the president of the seller, and a third person to be selected by the then president of the Farmers' Loan & Trust Company of the City of New York, and that the decision of a majority of such board of arbitration shall be final and binding upon the parties hereto.

"Eighth. Any changes or modifications in the terms, conditions, or covenants of this contract which may hereafter be agreed to may be made by written agreement, duly executed, provided the same be approved by a vote of both the parties here-

to acting by a majority of their several boards of directors or managers.

"Ninth. This contract shall become in effect on the beginning of the day of the date hereof upon written notice by either party to the other prior to August 1, 1910, of its intention to cancel this contract, it shall expire at midnight on the 28th day of February, 1911. Should no such notice be served, the contract shall continue to be operative until the expiration of six months after either party shall notify the other in writing of its intention to cancel the contract, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

"Upon the expiration of this contract, the buyer agrees to sell to the seller or to whomever the seller shall nominate, and it agrees to buy or cause to be bought, all coal then stored or in transit purchased of the seller by the buyer, at prices to be agreed upon; or in case the parties cannot agree, to be fixed by arbitration as herein provided."

Contract between L. V. Coal Co. and L. V. Coal Sales Co. Exhibit No. 3. Govt.'s Petition in this case (R., Vol. 5, 55 *et seq.*).

This contract, made and entered into the first day of March, in the year one thousand nine hundred and twelve, between the Lehigh Valley Coal Company, a corporation of the State of Pennsylvania (hereinafter called the mining company), party of the first part, and the Lehigh Valley Coal Sales Company, a corporation of the State of New Jersey (hereinafter called the Sales Company), party of the second part, witnesseth:

Whereas, the mining company is the owner and lessee of certain coal lands and collieries situated at various points in what is known as the anthracite region in the State of Pennsylvania, and has been engaged both in mining the coal from said coal lands and in preparing and selling the same, and

in like manner has sold large amounts of coal purchased by it in said State of Pennsylvania;

And whereas, the mining company in order to suitably handle, dispose of, and sell its coal, has constructed and leased storage plants, docks, and trestles, and other structures at various points in different States, and has entered into various agency and sales contracts;

And whereas, the said mining company desires, within the State of Pennsylvania, to sell and dispose of all of its coal;

And whereas, the sales company is desirous, except as hereinafter provided, to enter into a contract to purchase, in the State of Pennsylvania, all of the mining company's coal at the mines and collieries where the same is and shall be mined and prepared, in such way and manner as that, at said mines and collieries, it shall become the absolute owner thereof;

And whereas, in order that it may better transport the same, when it shall thus have become the owner thereof, to such points as it may see fit, it desires to become the lessee of the mining company, of various of its storage plants, docks, trestles, offices, and other facilities, and assume its present selling agency and sales contracts;

Now, therefore, in consideration of the premises and of the sum of one dollar ($1) by each of the said parties unto the other in hand well and truly paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants herein contained, it is agreed by and between the said parties as follows, to wit:

First. The mining company agrees to sell to the sales company and the sales company agrees to buy of the mining company all mined marketable coal wherever situated now owned by the mining company and either stored, held at various points, or in the course of transportation, and on hand at midnight on the twenty-ninth day of February in the year one thousand nine hundred and twelve, except such coal as the mining company shall elect

to retain for its use in the conduct of its business as hereinafter provided for. The sales company shall pay the mining company therefor in cash within thirty days of the date hereof as follows, namely:

For all the coal in transit at prices to include the full tariff charges of the transporting company and of all other carriers whose charges have been incurred or paid by the transporting company for the transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein at prices prevailing for the month of February, one thousand nine hundred and twelve.

For prepared sizes of coal stored at points west and north of Buffalo, N. Y. the sum of five dollars and seventy-five cents ($5.75) per gross ton.

For prepared sizes of coal stored at Buffalo and at points east thereof the sum of four dollars ($4) per gross ton.

For sizes smaller than prepared sizes stored at all points, not including that stored at or about the mines of the mining company, the sum of one dollar and twenty-five cents ($1.25) per gross ton.

There shall be an equitable adjustment between both parties hereto of the taxes for the year one thousand nine hundred and twelve assessed or to be assessed against such stored coal.

The sales company hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with the storage of said coal, and hereby assumes all risks and obligations in connection therewith from the beginning of the day of date hereof.

Second. The mining company shall lease and sublet to the sales company contemporaneously herewith, at a fair rental and with provisions in the lease that the sales company shall keep the said properties insured and in repair and with such other covenants and provisions as may be proper to protect the interests of the mining company, the follwing properties:

Hudsondale, storage and reshipping plant, Hudsondale, Pa.

Ransom, storage and reshipping plant, Ransom, Pa.

South Plainfield, storage and reshipping plant, South Plainfield, N. J.

Wyoming, storage and reshipping plant, Wende, N. Y.

Calumet, storage and reshipping plant, Chicago, Ill.

Chicago Avenue, storage and reshipping plant, Chicago, Ill.

Canal Street, storage and reshipping plant, Milwaukee, Wis.

Superior, storage and reshipping plant, Superior, Wis.

Riverside, coal trestle, Newark, N. J.

Arcade Street, coal trestle, St. Paul, Minn.

Grand Street, coal trestle, Jersey City, N. J.

South Broad Street, coal trestle, Newark, N. J.

Irvington, coal trestle, Newark, N. J.

Rochester, coal trestle, Rochester, N. Y.

Orange Street, retail yard, Newark, N. J.

Water Street, retail yard, Syracuse, N. Y.

22nd Street, retail yard, Chicago, Ill.

31st Street, retail yard, Chicago, Ill.

Colfax Street, retail yard, Minneapolis, Minn.

Frankin Street, retail yard, Minneapolis, Minn.

Clybourne Avenue, coal dock, Chicago, Ill.

Ann Street, retail yard, Chicago, Ill.

The mining company has leased certain facilities, structures and trestles, which it owns, and has sublet certain like facilities, structures, and trestles which it holds under leases to different persons as follows:

Geneva, trestle, Geneva, N. Y. Leased to Frank Dwyer.

Oswego, yard, Oswego, N. Y. Leased to A. H. Mowry.

Walden Avenue Yard, Buffalo. Leased to Yates-Lehigh Coal Company.

59th Street Yard, Chicago. Leased to Lill-Robinson Coal Company.

State Street Yard, Syracuse. Leased to Dalton Coal Company.

Magnolia Street Yard, Syracuse. Sublet to Dawson Coal Company.

Como Avenue Yard, St. Paul. Sublet to Carnegie Fuel Company.

Harrison Street Yard, Minneapolis. Sublet to Power City Fuel & Feed Company.

Western Avenue Yard, Minneapolis. Sublet to Carnegie Fuel Company.

Such of these properties as the mining company owns it agrees to assign its rights as lessor in the leases therefor to the sales company for the life of this contract and subject thereto. Such of its properties as it holds as lessee the mining company agrees to sublet to the sales company its rights as lessee therein and as lessor to other persons for and during the life of such leases, not to extend beyond the life of this contract, and subject thereto. For these properties the sales company shall pay the mining company the same fair rental provided for the other class of properties hereinbefore enumerated and with like covenants as provided therefor. The mining company agrees to use its best endeavors to secure a renewal to it as lessee of all the said leases in which it is now the lessee that may be terminated during the life of this contract on as favorable terms as possible. The sales company agrees to become the sub-lessee of all such leases and to assume the obligations thereof and all the covenants to be kept and performed by the lessee thereunder.

It is further agreed as to such properties as are now held by various persons as tenants or sublessees in case of the termination of such tenancy, the sales company shall have the right to substitute other persons in their places and to make subleases with such other persons for such length of time as it may desire within the term and period of this contract and subject thereto, provided, however, that the written consent of the mining company is first had and obtained.

The mining company has entered into various agency and sales contracts, which appear in schedule A hereto attached, and all such contracts shall

be assigned by it to the sales company and taken over by the sales company as of the date hereof for the term of such contracts, not to extend, however, beyond the life of this contract and subject thereto. The sales company shall assume all obligations of the mining company with respect thereto and be entitled to the benefits thereof.

Third. The mining company agrees to assign and does hereby assign, transfer and set over to the sales company all accounts payable for coal sold as they appear upon the books of the mining company, and the sales company hereby agrees to pay to the mining company therefor forthwith. The mining company hereby guarantees the collection thereof so far as they appear on the date of this contract, the guaranty not to cover interest thereon.

Fourth. Whenever in the opinion of the sales company it may become necessary to have additional facilities provided for the transaction of its business, such as storage plants, shipping trestles, docks and retail trestles, or any other structure having to do with the physical handling of the coal, the mining company upon being notified of such necessity may have the same constructed at its, the mining company's, own proper cost and expense, and thereafter it agrees to lease the said facilities to the sales company and the sales company agrees to enter into lease therefor; the rental to be a sum equal to 4½ per cent. net of the cost of such additional facilities. If the mining company does not proceed upon notice as aforesaid to have the said additional facilities constructed, then the sales company shall have the right to have the same constructed at its, the sales company's, own expense, and such construction so provided by the sales company shall thereafter be the property of the sales company; it is agreed, however, that the mining company shall at any time have the right to purchase and acquire such additional facilities constructed by said sales company upon one month's notice in writing given to said sales company for that purpose, and unless the parties can agree upon the value thereof the same shall be referred to

arbitrators under the arbitration clause hereinafter set forth. In such event the sales company agrees to at once lease the same from the mining company for the term of this contract and subject thereto, the rental therefor to be 4½ per cent. net of the value of such additional facilities.

In case the sales company finds it necessary to improve or enlarge the facilities now or hereafter leased to it by the mining company for the transaction of its business, such as storage plants, shipping trestles, docks and retail trestles, or any other structure leased to it by the mining company and having to do with the physical handling of the coal, or to erect new structures of any kind on such leased premises, the said mining company may, upon being notified of the necessity therefor, make such improvements and enlargements or new structures at its own cost and expense and thereafter an addition to the rentals provided for in such lease or leases shall be paid by the sales company that shall equitably represent the value of the property thus improved or enlarged. The sum to be paid as rental to be 4½ per cent. net of such value. This is not to apply to ordinary repairs or renewals that are to be made by and at the expense of the sales company. If the mining company does not proceed, upon notice as aforesaid, to provide for such enlargements and improvements, then the sales company shall have the right to make the same, provided, however, that thereafter such improvements and enlargements shall be and become the property of the mining company.

Fifth. Subject to the conditions and reservations hereinafter stated and at the prices hereinafter named the mining company agrees during the term of this contract to sell to the sales company all coal hereafter mined by it from all coal lands owned or leased by it together with all coal it may purchase. The sales company agrees to purchase and take all such coal at the prices hereinafter named and to pay the mining company therefor in cash in the manner hereinafter provided for. All coal shall be delivered to the sales

company by the mining company f. o. b. cars at the mines where the coal is mined and prepared. Deliveries shall be made from time to time as called for by the sales company. The sales company shall give on the twenty-fifth of each month notice of the quantity as nearly as practicable the sales company will require for the next month and arrange to take the coal in as nearly equal daily or weekly quantities as the requirements of the market will permit. The sales company shall use its best efforts to give orders for deliveries which will enable the mining company to work its collieries as many days in each year as possible.

Sixth. The sales company agrees to use its best efforts to develop trade and increase its sales and widen its markets for the coal, and the mining company agrees to use its best efforts to increase its production and deliveries to the sales company of said coal, whether from its own mines or the coal it may purchase. The mining company, however, shall be subject to no liability in case of a failure to supply the full demands of the sales company, if such demands shall be beyond the reasonable capacity of the mining company to produce or if the mining company shall be prevented, by reason of any strikes among its employees, or by reason of injury to its mines, breakers, works, buildings, fixtures or facilities, or for other cause beyond its ability to control. If by reason of any strikes among the employees of the sales company, or by reason of injury to the works, buildings, fixtures, handling facilities, or other property of the sales company or any property of the railroad company or companies by which the coal is transported to markets, the sales company shall be unable to take the coal as herein agreed, the sales company shall not be liable for nonfulfillment of this agreement during the period of such disability; provided every reasonable effort be made by the sales company to remove such disability at the earliest practicable period. The purpose and intent of this contract is to insure all reasonable efforts on the part of the mining company to prepare and

furnish to the sales company all the coal that it can reasonably arrange to deliver, either from its own mines or by purchase, and on the part of the sales company to give its undivided attention to developing and increasing the sales of coal delivered to it in the future by the mining company such increase in quantity as it is hoped the mining company may be able to furnish and deliver. So long as the mining company is ready and willing to deliver to sales company coal under this contract, sales company shall sell no other coal or fuels for itself or for any other persons outside of that which will require to be sold to comply with the terms of the existing hereinbefore recited sales agency and other sales contracts of mining company. In connection with its yards at certain places, and to conform to trade conditions, the sales company may, however, purchase, handle and sell bituminous coal to such extent as is absolutely necessary in order to maintain and develop its trade in the coal covered by this contract, the bituminous coal, however, to be handled by the sales company not to exceed three hundred thousand (300,000) tons annually; and it is permitted to deal in bituminous coal only because of the necessity to handle certain quantities thereof in order to retain its customers for the coal covered by this contract. The sales company hereby agrees not to purchase, handle, and sell any larger quantity of bituminous coal than is absolutely essential to enable it to take care of its business, as above set forth.

The mining company reserves the right to retain all coal required by it for its own use, this to include the right to stock such quantity of coal of various sizes as it may deem desirable, anticipating suspensions or other interferences with mining operations, or for any other purpose it sees fit, among others, the necessary amount for the operations of its mines, maintenance and operations of its pumps, etc., as well as all coal which it may desire to retain for the use of the Lehigh Valley Railroad Company for the operation of its owned,

leased, and controlled lines in the conduct of its or their business as common carriers.

It is understood and agreed that the mining company shall have the right to sell and dispose of at retail on its own account coal for the use and consumption of its employees. It may sell at retail to others in the immediate neighborhood of the mining company's collieries, provided that the coal so sold and disposed of shall not in any event be loaded in railroad cars but shall be hauled from the mining company's collieries by wagon; and the mining company shall retain such coal as is necessary to fulfill its obligations with its lessors.

It is understood and agreed by the parties hereto that during the life of this contract there may be times when it will be of advantage to the mining company, and not to the disadvantage of the sales company, that the mining company shall have the right to sell, lease, or exchange some of its coal properties or coal leases; and it is hereby agreed that as and when such occasion arises the mining company shall have the right to make such sales, leases or exchanges. The true intent and meaning of this provision is that the mining company shall not exercise such right to sell, lease, or exchange in such manner or to such extent, as to prevent or impair its ability to keep this agreement with the sales company, but shall only exercise such right in that behalf when the same shall not cause a substantial diminution in deliveries to the sales company of coal mined or purchased by such mining company and hereby agreed to be delivered.

Seventh. The sales company agrees to pay and the mining company agrees to accept the following price for said coal, when prepared in accordance with the standard hereinafter set forth, and delivered to the sales company f. o. b. railroad cars at the breakers where the same is prepared:

For all sizes above pea coal a sum equal to sixty-five (65) per cent. of the general average free on board prices of said sizes received at tide-points at or near New York, between Perth Amboy and Edgewater, computed as hereinafter provided.

For pea coal a sum equal to fifty (50) per cent. of the general average f. o. b. prices for pea coal at said tide points at or near New York when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the mining company shall be increased one (1) per cent. until the percentage paid for pea coal reaches sixty-five (65) per cent.

For buckwheat coal No. 1 a sum equal to forty (40) per cent. of the general average f. o. b. price at said tide points at or near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the mining company shall be increased two (2) per cent. until the said f. o. b. price reaches two dollars and fifty cents ($2.50) after which the proportionate price paid the mining company shall advance one (1) per cent. for each ten (10) cents advance in the f. o. b. price above two dollars and fifty cents ($2.50) as in the case of pea coal above mentioned. Provided that nothing herein contained shall oblige the sales company to pay for buckwheat No. 1 coal a higher rate than for pea coal.

For all sizes smaller than buckwheat No. 1 the mining company shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

It is also agreed that if at any time through changes of sizes of meshes of screens or of conditions of trade, the sizes smaller than buckwheat No. 1, as described herein, shall be marketable at tide at the same price as buckwheat No. 1, the scale of prices on a basis of forty (40) per cent., when the general average f. o. b. price at tide is two dollars ($2.00) per ton or less, shall be substituted for the flat price at mines herein provided for during the continuance of such conditions.

As to the coal mined by the mining company and only as to coal it mines and prepares, from the above-stated prices an allowance shall be made to the sales company with respect to all sizes for the first year of this contract of seven (7) per cent., for the second year 6 per cent., for the third year 5 per cent., for the fourth year 3 per cent., and for the fifth year 1 per cent.

Eighth. The general average f. o. b. prices herein referred to shall be determined by a disinterested expert accountant satisfactory to both parties, to whom the sales company shall furnish not later than the eighth of each month a statement of the quantity of each size sold during the preceding month and the amount realized therefor by the sales company at tide on all sales of each size of coal from the respective regions; and the accountant each month shall make a true average price for each size sold at tide of all the coal from the same region, and the average price thus obtained shall be furnished by the accountant to the sales company and the mining company, by whom it shall be accepted.

It is understood that when the words f. o. b. price occur herein the actual f. o. b. price received is meant, without any deduction for commissions, demurrage or other charges.

Ninth. Payments for coal shall be made monthly in cash. A partial payment of at least one dollar ($1.00) per ton shall be made on or before the twelfth (12th) of each month, and the balance on or before the twentieth (20th), for all coal delivered by the mining company under this contract during the preceding calendar month, provided, that if default shall be made by the sales company in any payment aforesaid, the mining company may, at its option, declare this contract forfeited by giving notice of such default for a period of at least ten (10) days, and of its intention to terminate this contract, unless payment shall be made in the meantime; but in case of a like default of payment in the next succeeding month this contract may be peremptorily terminated by the mining company without such notice. It is expressly understood

and agreed by and between the parties hereto that no failure or failures on the part of the mining company to enforce the forfeiture herein provided for shall be held or deemed to be a waiver or estoppel to enforce a forfeiture upon the causes herein set forth and in the manner herein provided whenever and so often as a new cause of forfeiture shall arise.

Tenth. All coal delivered under this contract shall be subject in the first instance to inspection under the direction of a chief inspector to be appointed by the mining company, whose duty it shall be to see that the said coal, as well as all other coal coming under his jurisdiction, conforms to the following standard except where meshes of a different size are provided for in existing leases to said mining company, viz.:

First. The coal shall be practically free from dirt as it leaves the lip screen before entering the car.

Second. The coal shall be well sized and made through and over the following square screen meshes, or their equivalents, viz.:

Broken, through a mesh 4 inches square and over a mesh 2¾ inches square.

Egg, through a mesh 2¾ inches square and over a mesh 2 inches square.

Stove, through a mesh 2 inches square and over a mesh 1⅜ inches square.

Chestnut, through a mesh 1⅜ inches square and over a mesh ¾ inches square.

Pea, through a mesh ¾ inches square and over a mesh ½ inch square.

Buckwheat No. 1, through a mesh ½ inch square and over a mesh ¼ inch square.

Buckwheat No. 2, or rice, through a mesh ¼ inch square and over a mesh ⅛ inch square.

None of the above sizes shall contain an admixture of a larger size sufficiently great to render the coal objectionable, nor respectively a larger proportion of any smaller sizes than is usually present in good merchantable coal; and it is especially agreed that neither egg, stove, nor chestnut coal shall contain more than five (5) per cent. of

larger sizes; that chestnut coal shall not contain more than ten (10) per cent. of pea and five (5) per cent. of buckwheat No. 1, nor pea coal more than fifteen (15) per cent. of buckwheat No. 1 and five (5) per cent. of Rice; nor buckwheat No. 1 more than fifteen per cent. of rice.

Third. The sizes above mentioned shall in no case contain more than the following percentages of refuse (consisting of slate, rock and fire clay), viz.: Broken, one (1) per cent.; egg, two (2) per cent.; stove, four (4) per cent.; chestnut, an average of not more than five (5) per cent., and at no time to exceed a maximum of seven (7) per cent.; pea, ten (10) per cent.; buckwheat, fifteen (15) per cent. Nor more than the following percentages of bone (containing a proportion of fixed carbon ranging between forty (40) and sixty-five (65) per cent.), viz.: Broken, two (2) per cent.; Egg, two (2) per cent.; stove, three (3) per cent.; chestnut, five (5) per cent.; pea and buckwheat shall not contain such proportion of said bone as to reduce the price below the average market price of those sizes. All coal shall be inspected at the breakers where the same is prepared.

The sales company shall have the right to appoint an inspector or inspectors, who shall be afforded every facility for inspecting said coal to ascertain if its preparation is in accord with the standard herein provided for and if said sales company's inspector shall decide that any particular coal is not in accordance with said standard of preparation, he shall immediately take the matter up with the mining company's chief inspector in that district. The sales company shall have the right to decline to take such coal until said inspectors shall have agreed upon the matter, and upon their failure to agree, until the question has been decided by some disinterested and qualified third person to be by them selected, whose decision shall be final. The cost and expense of such reference to be borne in equal parts by the parties hereto.

Eleventh. If the conditions of the trade shall at any time or times require a higher standard of preparation than as aforesaid, the mining company shall prepare the coal so as to conform to such higher standard, provided that the mining company shall be reimbursed for any increased expense involved.

Twelfth. A ton of coal under this contract shall consist of twenty-two hundred and forty (2240) pounds, and all coal delivered to the sales company by the mining company under this contract shall be weighed either upon the scales tested and approved by the sales company at the mines where the same is prepared and by weighmasters approved by the sales company, or upon weighing scales of the railway over which it passes on its way to market, and the amount of coal in each car shall be determined by the certificate of the weighmaster at such scales.

Thirteenth. The mining company will manifest the coal it delivers f. o. b. cars at its breakers to such points and parties as the sales company shall from time to time direct, and furnish and send to the sales company and to the consignees named by the sales company and such other parties as the sales company may direct such notice of manifest and such notice relating to the coal shipped as the sales company may direct. As to the coal the mining company may purchase from other persons and deliver to the sales company a like understanding and agreement will be incorporated in such contracts of purchase, if made in the future as are now in all present contracts.

Fourteenth. The mining company is the vendee under certain coal-purchase contracts, so-called. As to these, the coal now or hereafter to be delivered to the mining company is to be delivered by the mining company to the sales company at the mines where the same is mined and prepared. The mining company shall direct that the coal delivered under these contracts shall be manifested to such points and parties as the sales company shall from time to time direct, and shall require the sellers therein to furnish and send to the sales company

and to the consignees named by the sales company and such other parties as the sales company may direct such notice of manifest and such notice relating to the coal shipped as the sales company may direct. The sales company agrees to assume all the obligations to be kept and performed under such contracts on the part of the mining company from and after this date, and for and during the term of this contract and subject thereto. In case of any modifications or changes in such contracts agreed to by the mining company and the sales company during the life of this contract, the sales company agrees to conform to such modifications and changes and to carry out the terms thereof, so as to relieve the mining company from any liability therefor or in connection therewith. This is to include cost of inspection now provided for in such contracts.

It is mutually agreed by and between the parties hereto in consideration of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, that in the event of any disagreement as to the value of any additional facilities constructed by the sales company, which upon notice the mining company may have indicated its desire to purchase and acquire as provided in section fourth, all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the sales company, one person by the mining company, and these two arbitrators shall select a third, and a decision of a majority of such board of arbitrators shall be final, binding, and conclusive upon the parties hereto; and with reference to this provision for arbitration it is hereby further agreed that either of the parties hereto may enter the same in the court of common pleas of any county in the Commonwealth of Pennsylvania in accordance with sections 1 to 7 of the Act of General Assembly of the Commonwealth of Pennsylvania approved the sixteenth day of June A. D. one thousand eight hundred and thirty-six, entitled "An Act relating to reference and arbitration," and the procedure

indicated by said Act of Assembly may be followed and each of the parties hereto may have the benefit of all said provisions for the purpose of making this arbitration agreement binding and conclusive upon the parties.

Sixteenth. This contract shall become effective on the day of the date hereof and shall stand for the full term and period of ten years, subject to the right of forefeiture and cancellation as set forth in section ninth, provided, however, that either party shall have the right to abrogate and cancel the same at any time upon giving to the other six months' written notice under the seal of the company, attested by an executive officer, of its desire so to do, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

Seventeenth. This contract does not apply to the bituminous coal the mining company mines from its Snow Shoe properties, all of which coal is now sold to the Lehigh Valley Railroad Company for supply purposes.

In witness whereof, the said parties have executed this agreement in duplicate, under their respective corporate seals, attested by the signatures of their duly authorized executive officers, on the day and year aforesaid.

[SEAL] THE LEHIGH VALLEY COAL COMPANY,
By E. B. THOMAS, President.

Attest:
H. J. McQUADE,
Secretary.

[SEAL] LEHIGH VALLEY COAL SALES COMPANY,
By J. W. SKEELE, President.

Attest:
G. N. WILSON,
Secretary.

SCHEDULE A.—SALES CONTRACTS.

Retail yards, consignment:

Olney & Payne, Pawtucket, R. I.
Yates Coal Co., Rochester, N. Y.
C. C. West, Rochester, N. Y.
P. M. Lobas, Milwaukee, Wis.

Rail consignment:

Coal Supply Co., Chicago, Ill.
Geo. Lill & Co., Chicago, Ill.

Water consignment:

Coal Supply Co., Chicago, Ill.
Manitowoc Land & Fuel Co., Manitowoc, Wis.
St. Paul & Western Coal Co., Superior and Duluth.
Pittsburg & Lehigh Dock Co., Duluth.

Bituminous coal contracts:

Great Nor. Railway Co., St. Paul, Minn.
Chic., St. Paul, Minneap. & Omaha Ry. Co., St. Paul, Minn.
Nor. Pacific Ry. Co., St. Paul, Minn.
Minn., St. Paul & Sault Ste Marie Ry. Co., St. Paul, Minn.

Sales contracts on 65% basis:

Dickson & Eddy, New York City.
Mill Creek Coal Co., Mauch Chunk, Pa.

[redacted]1

No. [redacted]

Office Supreme Court, U. S.
FILED
OCT 3 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA,
Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY, AND OTHERS,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE FOLLOWING DEFENDANTS:

LEHIGH VALLEY RAILROAD COMPANY,
DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY,
THE INDIVIDUAL DEFENDANTS.

JOHN G. JOHNSON,
EDGAR H. BOLES,
Solicitors for said Defendants.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1916, No. 69.

THE UNITED STATES OF AMERICA,
Petitioner-Appellant,

vs.

LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY, LEHIGH VALLEY COAL SALES COMPANY, COXE BROTHERS & COMPANY, INC., DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY, NEW YORK AND MIDDLE COAL FIELD RAILROAD AND COAL COMPANY, THE G. B. MARKLE COMPANY, GIRARD TRUST COMPANY, EBEN B. THOMAS, LYMAN D. SMITH, EDWARD T. STOTESBURY, DANIEL G. REID, CHARLES STEELE, ABRAM NESBIT, GEORGE F. BAKER, GEORGE F. BAER, EDWARD B. SMITH, WILLIAM H. MOORE, EDWARD S. MOORE, WILLIAM R. BUTLER, HENRY B. COXE, and FRED M. KIRBY,
Defendants-Appellees.

BRIEF FOR LEHIGH VALLEY RAILROAD COMPANY, DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY AND THE INDIVIDUAL DEFENDANTS.

This is an appeal by the Government from a decree entered on February 8, 1915, in the District Court of the United States for the Southern District

of New York. The proceeding in said Court was begun in equity by the United States to prevent the defendants from continuing to engage in certain alleged violations of the "Sherman Act" and the "Commodities Clause" of the Interstate Commerce Act. The opinion of the Court below was filed December 31, 1914, and for the convenience of this Court a copy thereof is incorporated herein as an Appendix.

A Statement of the Defendants' Position or Case and a Summary of this Brief.

The defendants contend that they have no power to restrain or monopolize and they have not restrained or monopolized any part of trade and commerce. In the first place it is submitted that the ownership of the stock of the Lehigh Valley Coal Company and Coxe Brothers & Company, Inc., by the Lehigh Valley Railroad Company is not contrary to the Sherman Act, because it is not related to interstate commerce, and those two companies for more than four years past have not been engaged in interstate commerce, as they sell and dispose of their coal outright at the mines and have no interest in or relation to it thereafter. And secondly, taken by itself, the ownership of their stock is not a matter of regulation or control by Congress. Even if they should be held to be engaged in interstate commerce, they mine but a small percentage of the total production of coal in Pennsylvania, namely, about 10 per cent., and that small percentage is sold at the mines to a separate corporation in which neither they have nor the Lehigh Valley Railroad Company has any interest.

After the purchase as aforesaid at the mines, the

Lehigh Valley Coal Sales Company is free to sell the coal where it may please and when it may please, and has a full and unrestricted right of disposition therein, and there is no obligation upon it in any way to ship it via the Lehigh Valley Railroad to any point whatever. As a matter of fact it does sell coal at points on the Lehigh Valley Railroad; but the larger part of its sales is made throughout New England, as far west as Chicago and vicinity, and well into the south.

The theory upon which the Government has presented its case is unsound because:

First, The coal which the Lehigh Valley Coal Sales Company sells at points on the Lehigh Valley Railroad comes into competition with the coal produced by at least seven able and healthy competitors whose coal originates at points on said railroad, and they sell freely and in keen competition at all line points thereon.

Secondly, Parallel and competing railroads which carry enormous volumes of anthracite coal pass through a large proportion of the cities and villages reached by the Lehigh Valley Railroad, and the shippers on those lines come in competition with the shippers on the Lehigh Valley Railroad, and at several of the principal centres there are more than two competing railroads carrying coal of the various competing shippers, and at New York harbor as many as seven such carriers.

Thirdly, There are tariffs in effect known as switching tariffs, which give the dealers at every point where the Lehigh Valley Railroad is crossed or touched by another anthracite carrier the power and channel to buy coal from producers on such other railroad, and if the rates prescribed in those tariffs are not reasonable or the application thereof

is not clear, the Interstate Commerce Commission has ample authority to clear up such channel of commerce, throwing the coal produced by the various competitors on the line of such intersecting railroad into competition with the coal produced at points on the Lehigh Valley Railroad and sold by at least eight vigorous competitors.

Fourthly, The coal produced by the eight competitors on the Lehigh Valley Railroad either now meets in actual competition or can meet in potential competition the coal produced at points on lines of any anthracite carrier which connects with the Lehigh Valley Railroad at any point either through the existing joint rates in effect, enabling the producer on the other line to ship his coal to a dealer at any point on the Lehigh Valley Railroad, or through the power of the Interstate Commerce Commission on demand to establish new or additional through routes and joint rates.

Finally, the Sherman Act does not apply to the present relationships, because the facts show that even conceding every theory of the Government in presenting this case, they do not affect a part of commerce within the meaning of the Act, as a part of commerce is "anthracite," and under the Sherman Act there must be a direct restraint upon or monopolization of "all or the dominant portion" of a commodity, and not a minor part or less than 16 per cent. of that commodity.

Part II of this Brief, for the purpose of showing the lawful authority for the present relationships under the statutes of Pennsylvania and the vital necessity of having had a relationship established between anthracite mining companies and anthracite carriers, takes up the history of the acquisition

of the stocks of the two coal mining companies now owned by the Lehigh Valley Railroad Company.

A study of the origin and history of the relationships shows that they came about, not through any desire or intent to restrain or monopolize, and shows that the results thereof were quite contrary to restraint or monopoly, because the extensions of the railroad were in the public interest in that the railroad was extended to points where other railroads were already carrying anthracite, and thereby the Lehigh Valley Railroad Company fostered competition. Moreover, it established a new trunk line which has been for great public good.

The Railroad's relations with the coal producing companies never resulted in any public injury, nor, in view of the strict requirements of the acts regulating commerce, was there any possibility that they could result in public injury without immediate correction by the Interstate Commerce Commission; and the fact that the Commission, in spite of its enormous powers of inquiry and investigation and of correction, might have overlooked and thereby failed to correct some element of wrong, is not to be used at this time as an argument that the defendant Railroad Company should be deprived of its property at an enormous sacrifice and hardship upon the multitude of its stockholders; especially when the relationships now existing cannot by any sound theories be found to be against the public interest.

Moreover, it will be shown that the old relationships did not involve any discriminatory practice or preferential treatment, and that the purchase of the stock of Coxe Brothers & Company, Inc., and of the Delaware, Susquehanna & Schuylkill Railroad

Company did not suppress competition or tend in any way toward restraint or monopoly.

Part III deals with the Commodities Clause. The Lehigh Valley Coal Sales Company was organized in good faith, for a proper and legal purpose and is a separate, distinct and independent corporation. There has been no violation of the Commodities Clause, because there has not been a shadow of proof that the Coal Sales Company has come within the "departmental theory" announced by the Supreme Court in the case in 220 U. S., 257; therefore the law for this case is to be found in the first Commodities Clause case, 213 U. S., 366, and if, as held in that case, the ownership by the Railroad Company itself of the stock of the Selling Company did not involve an "interest, direct or indirect" within the meaning of the Interstate Commerce Act, then, *a fortiori*, the ownership by the multitude of the shareholders of the Railroad Company of the stock of the Selling Company cannot involve an interest, direct or indirect. *U. S.* vs. *D. L. & W. R. R. Co.*, 238 U. S., 516.

PART ONE.—THE PRESENT RELATIONSHIPS HAVE NOT RESULTED AND CANNOT RESULT IN ANY POWER TO RESTRAIN OR MONOPOLIZE.

At the outset it should be noted that the Government's premises, being based upon the *New York, New Haven & Hartford* case in 200 U. S. and the Great Northern case in England in 29 Law Journal, are totally inapplicable to the present situation because in each of those cases the ownership of the thing carried rested with the carrier during the course of transportation, whereas in this case the only link of connection in any form between the carrier and the shipper of the anthracite is that the majority in interest of the stockholders of the Railroad Company were at the time of trial a majority in interest of the stockholders of the Lehigh Valley Coal Sales Company. The latter company buys the coal produced by two companies of which the Lehigh Valley Railroad Company owns the stock, namely: the Lehigh Valley Coal Company and Coxe Brothers & Company, Inc. But that that temporary and purely voluntary joint holding of stock of the Railroad Company and of the Sales Company by the shareholders cannot in any way be related to the New Haven case is clearly evidenced by a remark of Mr. Justice White, now Chief Justice, in that case itself where he spoke of the law being satisfied if there were a segregation of interest so that the activities of the Railroad as a carrier could be clearly dealt with under the Interstate Commerce Act. See a discussion of the point in *U. S.* vs. *Delaware & Hudson Co.* et al., 164 Fed., 215, at page 245. If the Com-

modities Clause, therefore, is observed and, as we shall see in further portions of this Brief, it has been fully complied with, the argument of the Government, based on those cases, as to a tendency toward monopoly is wholly beside the point.

Therefore, it remains to be seen whether the Lehigh Valley Coal Company and Coxe Brothers & Company, Inc., by selling all their coal to the Lehigh Valley Coal Sales Company, can by any possibility give the latter Company an arm of power to restrain any part of interstate commerce or monopolize any part thereof. But, before going into the details of this latter question, let us go a little further back and discuss for a minute the status of the Railroad as the owner of the stock of the Lehigh Valley Coal Company and Coxe Brothers & Company, Inc.

I. The ownership of all the capital stock of the Lehigh Valley Coal Company and Coxe Brothers & Company by the Lehigh Valley Railroad Company is not an act in restraint of trade, nor can it result in a monopolization of any part thereof.

How that ownership came about and why is treated in another part of this Brief. Our present inquiry is concededly the principal one to be looked at, namely: whether the state of things which now exists is against the law. Under two Statutes of the State of Pennsylvania, the Act of March 31, 1868, and the Act of April 15, 1869, referred to more at length hereafter, the Lehigh Valley Railroad

Company acquired, and now owns, the stocks of the two coal companies mentioned. The New York & Middle Coal Field Railroad & Coal Co. was acquired under like authority and is still so held, but as it does not mine and sell coal, having leased all its lands to others, it is not mentioned further in this part of the Brief.

The stocks of those coal companies, having been acquired with the above recited statutory sanction, and having been held, without any question raised by the State of Pennsylvania for more than forty years, in spite of a full knowledge of the situation existing in its officials through annual reports to the Auditor General, and reports to the Bureau of Railways, it may be taken, at this point and for the purpose of the immediate discussion, as granted that, considered by itself, the stocks are lawfully held.

In any event, considered by itself the fact of that holding is outside the domain of federal regulation. The rule has been best expressed by Justice Jackson while a member of the Circuit Court in the case of *In re* Greene, 52 Fed., 104 and reiterated by Mr. Chief Justice White in his dissenting opinion in the Northern Securities case, 193 U. S., 197, at page 384, as follows:

> "It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations."

(a) *The dissociation from interstate commerce.*

It must be conceded that the Lehigh Valley Coal Sales Company's purchase-contract, gives title to the coal at the mines, and there is no reasonable construction of any part of that contract which can lead to any theory of an interest of the mining companies in the commodity after it is put in cars at the breakers. Therefore the Lehigh Valley Coal Co. and Coxe Bros. & Co., Inc., are not engaged in interstate commerce and how their stocks are held is not a matter for Congressional concern.

In this respect the Court below said the following:

> "The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce; for said relations begin, exist, and end within the limits of the state of Pennsylvania, and are there entirely legal.
>
> * * * * *
>
> "If the Lackawanna Case is to be followed, and any violation (at or since time when bill filed) of the commodities clause denied, there is no life left in this action, unless the meaning of the well-worn phrase 'interstate commerce' is to receive fresh enlargement. Complainant's evidence and arguments consist largely in an iteration of alleged wrongs committed in those far-off days when the same entity could mine, transport, and sell its own coal without encountering government interference. So great were those wrongs, it is said, that, even though transportation and ownership be now fully divorced in 'good faith', their recurrence can only be effectually prevented by finding monopoly and restraint in any owner-

ship by a carrier of potential tonnage—which is undoubtedly the railroad way of regarding unmined coal.

"But it is still true that to violate the Sherman Act there must be monopoly or restraint of a particular thing—'interstate commerce'. Separated from the commodities clause, the same kind of argument would apply to wheat or timber grown on the extensive realty of one of the 'land-grant' railroads of the West, and there is at bottom no difference between this argument against the Lehigh Railroad's retention of its coal stocks, and the view humorously condemned by Justice Brewer in an address well worth remembering*" (225 Fed., 399, 405).

In *United States* vs. *E. C. Knight Company*, 156 U. S., 1 (1895), it was held that the business *per se* of sugar refining in Pennsylvania bore no direct relation to commerce between the states and foreign nations. If anything, the present case is stronger, in that every sale by the mining companies is f. o. b. the mines and the vendee can then do with the coal as it pleases.

A little later is the case of *Dueber Watch-Case Manufacturing Company* vs. *Howard Watch and Clock Company et al.*, 66 Fed., 637 (1895), in which the Circuit Court of Appeals for the Second

*Note.—"The constitution gives to Congress the exclusive regulation of commerce between the states, as well as between this country and foreign nations; but who can now say, in view of legislation and judicial decision, at what period of time interstate commerce begins, and where it ends? If we listen to the contentions of some we shall be led to believe that when the farmer sows his wheat, having in view the gathering in the fall of a crop of grain which he intends to sell to a mill in some other state, the power of Congress attaches as upon a beginning of interstate commerce and continues until the wheat has been manufactured into bread and eaten by the consumer." Address before Virginia State Bar Association August, 1906.

Circuit affirmed a judgment dismissing a bill alleging a violation of the Sherman Act, because its "allegations did not preclude the inference that each defendant may have sold his entire product in the state where it was manufactured."

Referring to the Knight Case, in the case of *United States* vs. *Trans-Missouri Freight Association*, 166 U. S., 290, the Court said (at p. 325):

> "In *United States* vs. *E. C. Knight Company*, 156 U. S., 1, it was in substance held, reiterating the language of Mr. Justice Lamar in *Kidd* vs. *Pearson*, 128 U. S., 1, that the intent to manufacture or export a manufactured article to foreign nations or to send it to another state, did not determine the time when the article or product passed from the control of the State and belonged to commerce."

In *Hopkins* vs. *United States*, 171 U. S., 578, it was held that agreements among members of the Kansas City Live Stock Exchange, in spite of the fact that they had yards partly in Kansas and partly in Missouri, relative to certain restrictions as to the purchase of live stock from commission men, fixing commissions for selling live stock and like matters concerning the conduct of the Exchange, although they were all related to an extent to the purchase and sale of stock which had been transported from other states, were not contrary to the Sherman Act, as they did not fall within the domain of interstate commerce.

In the case of *United States* vs. *Reading Company et al.*, 226 U. S., at p. 367, the Court discusses the point raised in that case, that the 65 per cent. contracts did not relate to interstate commerce. But the facts relating to those contracts relative to the sale of coal on the basis of 65 per cent. of the tide-

water price, were so totally different from the facts in this transaction that the rule there can have no proper bearing upon the present point. In that case the Court found that certain 65 per cent. contracts, all made since 1900 by the various anthracite coal companies whose stocks were owned by the anthracite carrying railroads, had been made in pursuance of a general plan to take that much more coal out of the general competition, and, therefore, the Court said that "the expectation was that the coal would for the most part fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other States." Moreover, as the Court found, the competition which the various large coal companies had intended thereby to prevent by those particular contracts was the tidewater competition at New York, and, therefore, the Court said: "The general market contemplated was the market at tidewater, and the sales were made upon the basis of the average price at tidewater." And again, at page 368: "The *concerted* plan concerned the relations of these railroads to their interstate commerce and directly affected the transportation and sale and price of coal in other states. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control and sales at New York Harbor." Therefore, the Court said that "the mere fact that the sales and deliveries took place in Pennsylvania is not controlling." In the present case, however, the coal is sold to a Company which is not owned by the Railroad Company, no particular market is contemplated, and no plan led to the contract other than a full compliance with the Commodities Clause of the Interstate Commerce Act, with the

sole intent and purpose by the Lehigh Valley Coal Company and Coxe Bros. & Co., Inc., of withdrawing and disengaging themselves from interstate commerce.

(b) *In any event the stock ownership by the Railroad Company could only have an indirect effect on commerce.*

In the first *Reading case, U. S.* vs. *Reading Company et al.*, 226 U. S., 324, the Government charged a monopoly of production, transportation and sale by all the principal anthracite roads and the coal mining companies they owned or controlled. For the purpose of building up such charge of unlawful monopoly, it alleged, as one step, the acquisition by the Lehigh Valley Railroad Company of the stock of the Lehigh Valley Coal Company and Coxe Brothers & Co., Inc.; as another step, the acquisition by the Reading Company of the stock of the Philadelphia & Reading Coal & Iron Company; as another step, the acquisition by the Erie Railroad Company of the stock of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company; as another step, the acquisition by the Central Railroad Company of New Jersey of the stock of the Lehigh & Wilkes-Barre Coal Company; etc., etc. It failed in such charge of monopoly, and the decree of the Court below, dismissing the petition in respect of such charge, was affirmed in the case above cited. It was essential for the Government in that case to allege and attempt to prove that all the six groups involved acting together and taken together were necessary to sustain a charge of unlawful monopoly. The Government now, however, appears to take the anomalous position of charging that one of the steps above mentioned has in itself constituted a re-

straint of trade or monopoly, or that one of the six groups now constitutes a separate monopoly taken by itself. Having failed to sustain the general charge, it is hard to understand the logic of the Government's reasoning in asking this Court to say that one of the particular elements which in that case was charged as a step in effecting monopoly and which therefore formerly came under the general charge, now constitutes a restraint of trade or monopoly in and by itself; in other words, that there can be six different restraints of trade or monopolies which are each particularly unlawful and all of which, taken together, have been found by this Court not to have been unlawful. The position appears preposterous.

The Lehigh Valley Railroad is the sole stockholder in two companies, one of which owns 10.3 per cent. and the other 1.84 per cent., or a total of 12.14 per cent. of all the acreage of anthracite bearing lands in the three contiguous mining regions in Pennsylvania, known as the Wyoming, Lehigh and Schuylkill. Of the anthracite acreage which is naturally and conveniently tributary to the main lines, branches and spurs of the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company owns 22.3 per cent., and Coxe Bros. & Company, Inc., 4.56 per cent., or a total of 26.86 per cent. (4 R., 2654.)

In the first place, it is the mere holding of stock of Companies which own lands and are engaged in the mining of coal in Pennsylvania. In the case of *United States* v. *Winslow*, 227 U. S., 202, it was held that the joining together of two different branches of business was not a violation of the Sherman Act, and its application is clear to the holding by a railroad of the stock of a coal

company, as the business of the latter is not a part of or connected with that of the former. The mining of the coal and the transportation of the coal are two separate and distinct industries. In the second place, it is well outside of the rule announced in *U. S.* vs. *Patten*, 226 U. S., 525, that monopoly refers to "all or the dominant part of a commodity." The situation in respect to the *various* holdings of anthracite acreage in these three regions, embracing about 484 square miles, was stated by Judge Gray in the old Reading case (183 Fed., 427) as follows, and may be quoted here for the purpose of negativing any idea that the two coal companies mentioned above have any possessions which the manipulation of language might lead one to believe constituted a monopoly (p. 435):

> "The anthracite coal deposits of Pennsylvania are found in three quite distinct and separate fields or regions—the upper, or Wyoming, region extending in a northeast and southwest direction, and of comparatively narrow width, for a distance of 50 or 60 miles, partly on both sides of the Susquehanna river as it runs from the northeast to the southwest, containing 176 square miles in Lackawanna and Luzerne counties; the middle or Lehigh region containing 127 square miles in Luzerne, Schuylkill, Columbia and Northumberland counties; and the southern or Schuylkill region, in Schuylkill, Dauphin and Carbon counties, containing 181 square miles. Scranton and Wilkes-Barre are the principal towns of the Wyoming region, Hazelton of the Lehigh region, and Pottsville of the Schuylkill region. In each of these regions, there are many collieries and plants for preparing coal, including those owned and operated by the defendant coal companies or carriers, as well as by so-called independent coal companies and operators. Into each of them run one or more

of the defendant carrier companies, which with some other companies not defendants, collect and carry the coal adjacent to their lines, respectively, by means of the spurs and branches constructed from such lines to the various mines and collieries. Naturally, each railroad line carries the coal from that part of the coal region adjacent to it or conveniently reached by its spurs and branches.

"From one of the tables filed as a government exhibit, we take the following statement of the shipments of anthracite coal carried by the defendant railway companies, and two others, as initial transportation lines during 1907, and the proportionate percentage of the whole carried by each:

Railroad.	Gross Tons.	Per Cent.
Phila. & Reading Ry.	14,018,795	20.89
Lehigh Valley Railroad.	11,532,255	17.18
Central R. R. of N. J.	8,714,113	12.99
Del. Lack. & West. R. R.	10,237,419	15.25
Delaware & Hudson R. R.	6,562,768	9.78
Pennsylvania R. R.	6,203,271	9.24
Erie Railroad.	7,151,683	10.66
N. Y. Ontario & West. Ry.	2,689,089	4.01
	67,109,393	100.00

"It appears from the exhibits and testimony produced by the petitioner, that approximately 12 per cent. of the total production of coal in the anthracite regions is not shipped away, operation of the mines, and that, taking the year 1905 as a normal year, it would appear that, of the coal that was shipped away from the mines, about 25 per cent. was carried to tide water points in New York Harbor, and of the balance, about 20 per cent, was consumed within the State of Pennsylvania and 55 per cent. shipped to points outside the State, other than those at tide water in New York Harbor.

"As averred in the petition, and as appears in the agreed statement of facts, the distribu-

tion of coal lands among the principal holders at the time of filing the petition was as follows:

Name of Holders.	Area Possessed, Acres.
The Del. Lackawanna & West. R. R. Co....	17,253
The Del. & Hudson Co. and subsidiaries....	25,180
Hillside Coal & Iron Company.....	13,466
The Pennsylvania Coal Company.....	13,900
The N. Y. Susquehanna & West. Coal Co....	963
Scranton Coal Company.....	2,695
Elk Hill Coal & Iron Company.....	3,049
Lehigh & Wilkes-Barre Coal Company.....	15,650
The Temple Iron Company and subsidiaries..	4,465
Susquehanna Coal Co. and affiliated cos.....	16,867
Lehigh Valley Coal Company.....	37,047
Coxe Bros. & Co. Inc.....	5,311
Phila. & Reading Coal & Iron Co.....	98,077
Lehigh Coal & Navigation Co.....	13,783
Total.....	267,806
Total Coal Area (484 square miles).....	309,760

"Of these, the Delaware & Hudson Company and its subsidiaries, the Scranton Coal Company, the Elk Hill Coal & Iron Company, the Susquehanna Coal Company and affiliated companies, and the Lehigh Coal & Navigation Company, whose ownership aggregates 61,574 acres, are not defendants in this proceeding, as participants in the general combination or conspiracy charged by the petition against the original defendants therein named. This would leave about two-thirds in area of the coal lands of the anthracite region in the ownership or possession by lease or otherwise, of the defendant companies."

That the acquisition of the stocks of two of those companies by the Lehigh Valley Railroad Company did not involve at the time thereof any restraint of trade is shown more in detail at a subsequent part of this Brief. Suffice it to say now that after their stocks were acquired each continued as theretofore

to mine its coal freely, and, in fact, each increased its production every year thereafter, with the exception of the years in which there were miners' strikes. The fact that the officers of the Lehigh Valley Coal Company became the officers of Coxe Brothers & Company, Inc., is no evidence that the two companies thereafter secured any control of any market or any power to affect prices or supplies at any point. And there has been no testimony in this case to show that such power was secured. The production of the Lehigh Valley Coal Company in 1905 was about 5,800,000 tons and that of Coxe Brothers & Company, Inc., 1,305,000 tons, and their relative production has been virtually the same ever since. (Railroad Exhibit 62, 4 R., 2315.) The shipments of the two companies in 1911, the year before they both began to sell to the Lehigh Valley Coal Sales Company, amounted to a little over 7,000,000 tons and the shipments over all railroads during the same year were just a little short of 70,000,000 tons, or nearly ten times the total production by the two companies mentioned. (Railroad Exhibit 56, 4 R., 2308.) Moreover, the Coxe Brothers production, as will be seen from said exhibit, was virtually all shipped to New York tidewater, and there met the competition of coal shipped over six competing railroads, and to the extent that any of the Coxe Brothers production moved further on, and into New England, it met like competition with the coal which all those competing railroads delivered to their railroad connections at New York and vicinity, as well as coal reaching New England via other routes. Hence, under the most favorable view of the Government's case, any restraint of trade that *may* have been involved was so incidental and inconsequential as not to have been against the Sherman Act. There-

fore, there was no continuing restraint the results of which could be said to have been handed over to the Lehigh Valley Coal Sales Company when it—in March 1912—began to buy the coal of both companies at the mines and sell it with its own agents.

Judge Hough in the court below in this case said in this connection (225 Fed., 399, 405):

> "It cannot be charged, and it is not asserted in argument, that monopoly exists because of the control of so small a portion of the anthracite acreage as has been stated above; nor yet in the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers."

The case of *United States* v. *Patten*, 226 U. S., 525, said that monopoly consists in a control of all or the dominant portion of a commodity.

Control of one-ninth of the product of copper of the United States was held not sufficient to constitute a monopoly in *Bigelow* v. *Calumet & Heckla Mining Company, et al.*, 167 Fed., 704, 721. See also *Montague* v. *Lowry*, 193 U. S., 38; *Northern Securities Company* v. *United States*, 193 U. S., 197; U. of P. Law Rev., Vol. 62, p. 258.

Therefore, we must study the situation relative to the transportation and sale of the coal to see whether the Act has been violated or can be violated by the present relationships, because, obviously, the mining of the coal, by the Government's own exhibits, is shown not to cover all or the dominant portion of the commodity, the production of the Coal Company and Coxe Brothers being but 10 per cent. thereof.

Let us see, therefore, whether a situation of the kind said to be lawful in the decided cases exists

or whether by any possibility one of an unlawful character can occur and then if the Court thinks that a restraint or monopoly has occurred or might occur, or, as was said in the case of Swift & Co. *vs.* U. S., 196 U. S., 375, there is a *"dangerous probability,"* let us look at the past and see by what means and methods the situation has been brought about for the purpose of throwing light on its reasonableness.

II. The Lehigh Valley Railroad Company as one of many competing anthracite carriers.

The first step in which the Lehigh Valley Railroad Company has an interest is the transportation of the coal from the mines. The Record shows the network of railroads in the anthracite regions, and through Trunk Line Territory (4 R., 2278), the competition that exists between them for anthracite traffic (4 R., 2301, 2308), the extent to which they criss-cross each other, and meet most vigorous competition not only at points along their lines, but at every large center of distribution (4 R., 2314). The anthracite regions produced in 1911 over 80,000,000 tons of anthracite coal, and 75,322,855 tons in 1912, the smaller production the latter year being due entirely to the suspension of mining for a period pending the settlement of certain demands by the miners relative to their time and pay for labor (R., 2087). Of course, a large part of this production was never shipped away from the mines, as it is consumed in the operation of the breakers—the Lehigh Valley Coal Company, out of a production of 7,296,120 tons itself having

been obliged to consume nearly a million tons at the mines (4 R., 2315).

The anthracite fields from which this tonnage is produced, are reached by ten so-called initial railroads, as follows:

Lehigh Valley Railroad,
Phila. & Reading Railway,
Central Railroad of New Jersey,
Del., Lackawanna & West. Railroad,
Delaware & Hudson Co.,
Pennsylvania Railroad,
Erie Railroad,
New York, Susquehanna and Western Railroad,
New York, Ontario & West. Railroad,
Lehigh and New England Railroad (R., 2109 and Petition, p. 13).

The first nine of those lines carried in 1912 from the anthracite regions 63,610,578 gross tons, of which the percentage carried by the Lehigh Valley Railroad was 18.54 per cent.; and in 1913 they carried 69,069,628 tons. of which the Lehigh Valley Railroad carried 18.84 per cent. (Railroad Ex. 56, 4 R., 2308).

(1) *The track connections at the mines.*

There is one factor in the transportation of coal which some of the witnesses said was a "natural monopoly", and that is the gathering of the coal from the breaker. There is but one railroad track under a breaker, and if a railroad owns that track it obviously has a natural monopoly in reference to the hauling of coal away from that breaker. On that track, cars are placed under the chutes through which the different sizes of coal are

dropped, and then are either let down by gravity or pulled away (3 R., 1207-8). If, as in the case of the Plymouth Coal Company, the company owns its own breaker track then, of course, the natural monopoly largely, if not entirely disappears, because it can drop its cars by gravity or pull them with its own engine if it has one or ask the engine of the carrier to pull them to an assembly track, and any railroad line which is accessible enough to the location of the assembly track to build a branch or spur to it will naturally do so if the amount of traffic can reasonably be forecasted to justify such expenditure.

When a mine opening was made, if the mining company did not have both railroad and mining powers, as many of them did, then the nearest railroad which believed the traffic would so justify built a branch to that opening, and, of course, had the ownership of the breaker track. Each railroad, therefore, depending upon the topographical conditions, served, sooner or later, the collieries to which it could most conveniently connect its line. Railroad Exhibit 54, 4 Record, 2305, shows the name of each colliery presently located on the originating lines and branches of the Lehigh Valley Railroad Co., and shows with what other railroads, if any, each of those collieries is also connected, and what railroads are located within a mile thereof, on the perfectly reasonable assumption that a mile would be the limit of convenient accessibility in view of the rolling, and in some cases, precipitous, character of the regions. Of these 57 collieries and washeries, 14, or 24.56 per cent., are now connected with one or two other railroads; 17, or 29.82 per cent., have no other railroad within a mile of them. Of the remaining 26 collieries, 17, or 29.82 per cent.

are so located that it is not practicable, because of conditions explained on the exhibit, to build another railroad branch to them. The remaining nine collieries, or 15.80 per cent. of the whole, have railroads within a mile and conveniently accessible, but are not connected therewith.

The first one of those latter nine is the Spring Brook Washery, having a total tonnage shipment for the year ending June 30, 1913, of 27,793.08 tons. No railroad will build a half mile of track to compete for that tonnage.

Another one of these nine is the Florence Colliery, operated by A. M. Wyman, having a tonnage for the year ending June 30, 1913, of 269.12 tons, which was hauled by team to the Lehigh Valley Railroad.

The third is the Miners Mills Colliery, operated by the Healy Coal Company, having a tonnage of 57,227.14 tons for the above year. The remarks on the exhibit, which was prepared by Mr. Shea, the Superintendent of the Lehigh Valley Railroad Co., Wyoming Division, are pertinent in this connection:

> "The Central Railroad of New Jersey are within two hundred feet of this colliery, and in fact are closer to it than the Lehigh Valley Railroad. The D. & H. and Wilkes-Barre and Eastern are each within 3,000 feet, and connection could easily be made by both of them. In this connection it might be interesting to note that although the colliery is located nearer the Central Railroad of New Jersey than the Lehigh Valley, the Colliery, at their own expense and with considerable physical resistance on the part of the Central Railroad of New Jersey, made their own connection with our tracks" (4 R., 2305). That was in 1906.

All the remaining collieries not so connected, 6 in number, or 10.52 per cent. of the whole, are operated by the Lehigh Valley Coal Company, and if the railroads located within a mile of them do not want to build branches to those collieries, the railroads in question being the Philadelphia & Reading in two instances, the Jersey Central in three, the Lackawanna in two, and the D. & H. in two,—some of the collieries having more than one railroad within a mile—certainly neither the Lehigh Valley Railroad nor the Lehigh Valley Coal Company can make them connect. It may be that in the instances mentioned the Lehigh Valley Railroad owns the track under the breaker, but whatever the reason certainly the Lehigh Valley Railroad is not to be charged with any misconduct because of four other railroads not having done something in respect to which the Lehigh Valley Railroad is powerless.

If the Lehigh Valley Railroad had desired to secure a monopoly of production, transportation and sale of coal, obviously the best way to have started that procedure, assuming that there is a territorial unit to be served, would have been to lock up the avenues of commerce to other collieries located near the tracks of the Lehigh Valley Railroad and refuse to give them a branch or spur connection. Every time a track connection was made with a colliery it brought another competitor into the field against the Lehigh Valley Coal Company. Recently a track connection was put in with the Kingston Coal Company and the Superintendent of the Wyoming Division testified that he would connect his line, and would be glad to, with any accessible colliery (3 R., 1432).

(2) *The Switching Charges.*

It has been alleged that the Railroad Company has attempted to erect a so-called tariff wall along its line, in order to monopolize the production, sale and transportation of coal within some certain vague and undefined boundaries, which the Government in the Court below called a "territorial unit." It is plain that as to the Railroad's relation to the origin of the transportation, or the first haul, the territorial unit is inapplicable, because the Sales Company buys at the mines and can ship wherever it pleases; and as to the collieries which it does not buy from, all such have other railroad connections anyway. Railroad Exhibit 52, 4 R., 2301. And if it said that the Sales Company is obliged to ship its coal at least a small part of its journey over the Lehigh Valley Railroad because there are no other railroads connecting with certain collieries, then we have seen that that is true as to some of the collieries, but the Lehigh Valley Railroad Company has no power to make those other lines extend their railroads a foot; and as to the others from which it buys its coal, it is wholly impracticable that other railroads should connect with those collieries, even if they so desired.

Now, let us see what happens as the coal moves along the railroad's line. Mr. Grier, the Coal Freight Agent of the Lehigh Valley Railroad Company, testified (1 R., 324) that at points where two railroads cross it was the common arrangement to establish switching charges; that is to say, the road doing the switching in the town made a charge therefor which was generally absorbed by the line which had the long haul and brought the coal to the town. Asked at what points on the Lehigh Valley Railroad that arrangement pre-

vailed, he said: "It is common at almost every point where we meet another railroad." The effect of this switching charge arrangement with connecting lines is to give carriers that connect with the Lehigh Valley Railroad at different point along its line access to any of the dealers whose yards are located adjacent to the tracks of the Lehigh Valley Railroad (1 R., 338). The petition in this case (5 R., 33), has a list of most of those dealers, and a reference to Railroad Exhibit 34 (4 R., 2278) will show that at many points along its line the Lehigh Valley Railroad is crossed by competing anthracite carriers; for example, the first twenty-three items in the Government's list of dealers are located at Allentown, reached also by the Jersey Central and Reading Railroads. Mr. Grier's further testimony was (1 R., 338):

> "Q. This switching charge has the effect of giving the carriers that connect with us at the different points along our line, access, however, to any of those dealers, does it not? A. Yes.
>
> "Q. All around where there is a connecting line at the points shown? A. Yes.
>
> "Q. And it gives them access on the basis of delivery rates on account of the absorption of the switching charge? A. As a general proposition, yes; that puts them on the same basis as if it came direct via our line and direct via the other road.
>
> "Q. In other words, by your agreeing to that switching you give other carriers which originated anthracite traffic access to every dealer located in a city where we connect with that other line? A. That is the effect of it, yes.
>
> "Q. On the same basis as if the dealer were located on the originating line? A. Yes.
>
> "Q. He gets his coal just the same as if the originating line switched into his trestle. A. Yes.

"Q. And we simply act as agents of the originating line in that transaction? A. Yes.

"Q. And those privileges exist irrespective of the extent to which they may be availed of? A. No restriction. The very thing that is done in a case of that kind is where the usefulness of the traffic officer of the railroad is, if it has any at all, is I think to persuade that consignee to give him the long haul by claiming it will pay the Lehigh Valley Railroad a better revenue.

"Q. Of course you much prefer to get the long haul than to get a little switching charge? A. Undoubtedly."

Mr. Grier, of course, explained that the Lehigh Valley Railroad always desired the long haul, and that it was one of his duties as a traffic officer to solicit the dealer to route his coal over the Lehigh Valley Railroad as far as he could. That is a perfectly legitimate and proper act of competition.

The switching tariff introduced as Lehigh Valley Coal Sales Company, Exhibit No. 48 (4 R., 2543) is referred to by the Government as being narrow in its scope, because it only covers 21 points. What significance is to be attached to the fact that none of these points lie between the mines and tide-water is not clear, because an examination of Railroad Exhibit 34 will show that the Lehigh Valley is paralleled all the way to the Delaware River by the Jersey Central, is criss-crossed and intersected several times through the State of New Jersey by that line, is crossed several times by the Pennsylvania, and paralleled part of its distance by the Reading (4 R., 2278). Tariffs are bulky, and the files of the Interstate Commerce Commission contain reams of them, and when there is no demand for a particular rate arrangement it would be absurd to say that the arrangement should be published anyway. Nobody

sooner than the Interstate Commerce Commission would discourage the publication of paper rates. Mr. Grier testified that this switching policy does prevail, and if a dealer at any point on the Lehigh Valley Railroad demanded a switching rate in order that he might buy coal from a colliery on another line, competitive circumstances would compel its adoption. And whether the commerce would be state or interstate, he can make his application to either Federal or State Commission to require the adoption of the switching rate. That a carrier may be required by the Interstate Commerce Commission to make such delivery was held in the cases of *St. Louis, etc., R. R. Co.* vs. *P. & P. Rwy. Co.*, 26 I. C. C., 226, and *Waverly Oil Works Co.* vs. *P. R. R. Co.*, 27 I. C. C., 621, 628. See also *Grand Trunk Rwy. Co.* vs. *Michigan R. R. Commission*, 231 U. S., 457, 468. Mr. Grier testified that where the above switching tariff did not apply there could be applied the mileage rate tariff, which was general in its terms and applied *at any intersecting point on the Lehigh Valley Railroad* (1 R., 347 and 3 R., 1958). Therefore, as the Interstate Commerce Commission said in the case of *Merchants and Manufacturers Association* vs. *Pennsylvania Railroad Company*, 23 I. C. C., 474, the Railroad Company, by that tariff, has "opened the channels of interchange" and if the rate by itself is considered to be either too high or considered to be discriminatory for any collateral reasons, the Commission is fully authorized to establish the reasonable switching rate in the premises. See also *Leonard* vs. *C., M. & St. Paul Rwy. Co.*, 12 I. C. C., 492, and *In re Wharfage Charges of the Galveston Wharfage Company*, 23 I. C. C., 535.

Mr. Grier said (1 R., 346), that as long as he had been with the Company, since 1906, the Lehigh Val-

ley had also adopted the practice of absorbing the switching charges of other lines where it had the long haul and the connecting line switched at the town. His testimony in this respect was as follows (1 R., 346):

> "Q. Mr. Grier, one or two questions. How long has that practice of absorbing switching charges on anthracite coal been in effect on the Lehigh Valley? A. Well, back ever since I think I came with them—1906.
>
> "Q. Do you mean to say that the Lehigh Valley Railroad will deliver to another railroad at the same price at which it will deliver on its own line? A. Yes; we have many such instances.
>
> "Q. And that other railroads will deliver to the Lehigh Valley Company for the same price, same freight, at which they will deliver at the same point on their own line? A. Yes, sir, we have many instances."

Also, that while it was his practice, of course, to encourage "home industries" in order that the Lehigh Valley Railroad Company might get the long haul, nevertheless the Company joined in the plan in reference to switching charges (1 R., 348), no doubt due to the competition with the other carriers.

(3) *Joint Rates.*

Another factor which opens up *every point* on the line of the Lehigh Valley Railroad Company to every colliery located on any other railroad line is either the existing joint rates or the power of the Interstate Commerce Commission to establish joint rates on demand. It is true that the present existing joint rates are not many, for two reasons; first, because there has been no demand, and sec-

ondly, because solely for traffic reasons the policy of the Lehigh Valley Railroad Company has been against them. Now, a joint rate means that irrespective of where the line which originates the haul of anthracite may connect with the line which is to make the delivery, nevertheless the traffic may move between a colliery on the other line and the point of consumption on the Lehigh Valley. Since 1906 the Interstate Commerce Commission has had authority to establish joint rates, but until the present year there was never a case brought before it asking such establishment, *i. e.*, until the case of the Red Ash Coal Company, and there the joint rate was established voluntarily by the defendants, and no previous demand had ever been made directly to them (1 R., 348). The utter inability of the Lehigh Valley Railroad Company, therefore, to build up this fanciful tariff wall or create a field for monopoly is clear from the authority of the Interstate Commerce Commission to let any dealer on the Lehigh Valley buy his coal from any colliery on any other railroad with which it connects. The Commission's authority in that respect has been exercised time and time again. See Drinker's "The Interstate Commerce Act", section 276, where the law is summarized with numerous citations as follows:

> "The amendment of 1906 makes it the duty of carriers, under the act, to establish through routes and just and reasonable through rates applicable thereto, and gives the Commission power, after hearing on complaint, to establish through routes and maximum joint rates, and to prescribe the division thereof among the carriers, provided no reasonable or satisfactory route exists."

As to the policy of the Company, Mr. Grier said that it was due to the fact that the demand for anthracite at points on the Lehigh Valley was much less than the supply and under those circumstances he thought the Lehigh Valley Railroad Company ought to have the long haul. Mr. Large, the Coal Traffic Manager of the Pennsylvania Railroad Company, testified that his Company had the same policy in respect of bituminous coal, because the underlying reasons were the same. And his Company owns stock in no bituminous coal companies (3 R., 1723). With respect to anthracite, the policy of the Pennsylvania Railroad was different, because the demand at points on its lines was so much greater than the sources of supply which it reached direct. If such a policy is wrong, then the cases of *Texas Lumber Rates*, 28 I. C. C., 471, and *Hughes Creek Coal Company*, 29 I. C. C., 671, are sufficient to show the authority of the Interstate Commerce Commission to correct it, if the circumstances so demand. But that the Commission takes into consideration the surrounding circumstances is clear from an examination of some of its other cases; for example, *Enterprise Fuel Company* vs. *Pennsylvania Railroad*, 16 I. C. C., 219, where Commissioner Lane said:

> "A railroad cannot say that it can retain a monopoly on a certain traffic, no matter what its service or what the public necessities require. A shipper, on the other hand, is not entitled to a through route because he may not be as conveniently served by one railroad as another."

While the tonnage shipped from collieries on other lines to points on the Lehigh Valley Railroad may not in the past have been large, nevertheless

that is not the slightest indication of the power of the Lehigh Valley Railroad to prevent any colliery on any connecting line from shipping to points on its line. Railroad Exhibits 80 (4 R., 2369), 81 (4 R., 2373), 82 (4 R., 2374), 83 (4 R., 2377), 84 (4 R., 2378) and 85 (4 R., 2379) also show in brief form the numerous tariffs which have been issued by the Lehigh Valley enabling anthracite shippers on its lines to ship freely into territory on other lines. In other words, not only has the Railroad Company shown no desire to keep collieries in other districts from shipping to points on its line and thereby competing with the many producers or miners upon its line, but has freely enabled the latter to find if they so desired a wider market than the points of consumption along the Lehigh Valley Railroad.

In June, 1912, the Interstate Commerce Commission instituted a general inquiry and investigation for the purpose of determining what correction, if any, should be made in respect of the practices of the anthracite carriers, whether the carriers' rates were reasonable and whether additional through routes and joint rates should be established. On July 30, 1915, a decision was rendered (I. C. C. Docket No. 4914). No additional joint rates, however, have been ordered. The inapplicability of the Commission's reasons, in respect of the establishment of additional joint rates, is obvious as to the Lehigh Valley situation, however, because there are no "coal operations" owned by the Lehigh Valley Railroad Company which now ship coal over its rails. No discriminatory practices on the Lehigh Valley Railroad have been shown to exist either in this proceeding or in the proceeding before the Interstate Commerce Commission in respect of the

transportation of anthracite since the organization of the Lehigh Valley Coal Sales Company and its taking over, with an entire new, separate and distinct regime, of the business of the shipping and selling of anthracite theretofore done by the Lehigh Valley Coal Company. It must be clear, therefore, that by reason of past practices at least for the last four years the Commission has not seen the need of ordering any additional joint rates in conjunction with the Lehigh Valley Railroad, and that it sees no such need at present by reason of any commercial practices. This adequately relieves the Lehigh Valley Railroad of any charge of restraint of trade or monopoly by reason of its policy in respect of joint rates on anthracite.

(4) *The local rates.*

(*a*) Action of Interstate Commerce Commission.

The Petitioners have contended that the Lehigh Valley Railroad Company has been enabled to build up and maintain a monopoly by charging unreasonably high rates for the transportation of coal. In the Court below in this case, it was found by Hough, *J.*:

> "The charge in the bill that freight rates for coal carried were made unreasonably high for the purpose 'of injuring independent producers of anthracite' and of forcing them either to sell their mines * * * or enter into contracts for the sale of their output is not proven;—nor is there any such allegation as to existing freight rates or rates existing at the time of bill filed" (225 Fed., 399, 404).

During all the history of the Company there have been but two instances prior to Docket 4914 where a reduction of its anthracite rates has been ordered by

any Commission. The first was in the *Coxe Brothers Case,* 4 I. C. C., in 1891, and involved the rate from one Region, namely, the Lehigh, to a single point, namely, Perth Amboy, New Jersey, f. o. b., that is, for transshipment beyond, and that reduction the United States Circuit Court for the Eastern District of Pennsylvania (74 Fed., 784) found to have been ordered upon an incorrect analysis of the facts considered by the Commission relative thereto (Railroad Exhibit 94, 4 R., 2428). The second reduction was from one Region, to wit, the Wyoming, also to Perth Amboy, f. o. b. *Meeker & Co.* v. *L. V. R. R. Co.,* 21 I. C. C. 129. Government counsel have characterized these reductions as "very moderate." If we acquiesce in that statement and also consider the fact that only one rate was involved in the determination, that is, from the Wyoming Region to Perth Amboy, it is the thinnest kind of basis for the allegations by the Government that the defendant's *rates* are and have been unreasonable. Moreover, the Commission did not award reparation to Meeker & Company on account of illegal preferences given by the Railroad Company to the Lehigh Valley Coal Company. This award of reparation is referred to later herein in detail, but it may be briefly remarked here that that part of the Commission's award which related to discrimination was on account of a situation which Meeker & Company put themselves in voluntarily, having refused at one time to acquiesce as all other shippers did in an adjusted basis of rates. The Commission said, in its opinion, that the adjusted rates were applied impartially (2 R., 718).

On June 10, 1912, the Interstate Commerce Commission, under Docket 4914, ordered "that an inquiry be and the same hereby is instituted by the Commission on its own motion into the rates, prac-

tices, rules and regulations of common carriers governing the transportation of anthracite coal from producing fields to all points in the United States east of the Mississippi River and north of the Ohio and Potomac Rivers, known as Official Classification Territory, including domestic and export rates and ship-side or bunker coal rates to tidewater and lake ports." The remainder of the order, which is a public document, reads as follows:

> "*It is further ordered*, That said inquiry shall ascertain whether the coal is mined or produced by or under the authority of common carriers engaged in the transportation thereof, or whether common carriers own in whole or in part any mine or mines producing anthracite coal which they transport or whether common carriers are directly or indirectly interested in any mine or mines producing anthracite coal which they transport.
>
> "*It is further ordered*, That this proceeding and inquiry be conducted with a view to the issuance of an order or orders requiring such respondents to cease and desist from charging, demanding, collecting, or receiving rates and charges for, and from enforcing their practices, rules and regulations governing the transportation of anthracite coal from points of origin herein named to destinations herein referred to, in so far as the same may be found to be unlawful, and requiring such respondents to substitute and thereafter to put in force and effect such rates, rules, practices, and regulations relative to the transportation of anthracite coal as aforesaid as may be found just and reasonable, and not unjustly discriminatory, including such joint and proportional rates as in the opinion of the Commission should be established from points of origin to the various destinations referred to.

"*It is further ordered,* That the Commission shall set this proceeding for hearing at such times and places as may be hereinafter determined.

"*It is further ordered,* That a copy of this order and of subsequent orders and notices in this proceeding be served upon the various common carriers respondents herein;"

and as respondents the Commission named some one hundred and seventy-five railroads. As was intended by the Commission, however, the burden of the inquiry was placed upon the so-called originating anthracite lines. As heretofore stated, the Commission rendered a decision on July 30, 1915, in this proceeding, and so far as the Lehigh Valley Railroad is concerned, ordered anthracite rates from the producing regions to Perth Amboy, N. J., for transshipment beyond to be reduced to $1.40. In other words, to the basis established in the Meeker case, wherein the reduction has been characterized by Government Counsel as "very moderate", and if the reduction, as Government Counsel claims, was very moderate in the Meeker case, it is even more moderate in this proceeding because the Commission has permitted increases in the rates to all points on the smaller sizes of anthracite coal, which constitute about 14 per cent. of the anthracite tonnage shipments. This rate to tidewater—in other words, Perth Amboy f. o. b. rate—is in the nature of a basic rate, and using it as a basis, the Commission ordered relative reductions to various line points east of the mines. West of the mines reductions were ordered to several points in New York State but all east of Rochester, N. Y.; and with an increase authorized in the rates on the smaller sizes. It is difficult to deduct any element of restraint of

trade or monopoly from the action of the Commission in this proceeding, which was a complete and comprehensive review of all this defendant's anthracite rates as well as those of other carriers, when we consider that the reduction in the Meeker case was characterized by Government Counsel as very moderate and the reductions in this subsequent and comprehensive proceeding are even more moderate and when we further consider that in this proceeding the reductions are in the last analysis based upon a line of investigation and reasoning which involves a *non sequitur*, viz: because many years ago the financing of the mining companies, under the authority of the statutes of Pennsylvania, gave rise to acts which were deemed contrary to later legislation enacted by the United States, that therefore those matters of intercorporate finance must have had some relation to transportation rates on the railroad and that consequently the rates must have been and are still too high. But on what theory the rates for the smaller sizes must have been too low (and increases therein were authorized in spite of the fact that no application therefor was made by the carriers), is not only not clear from the opinion but not even mentioned.

It would be a far stretch of the Sherman Act to say because the Interstate Commerce Commission may have found one rate of the defendant or one hundred or more rates of the defendant on anthracite to be unreasonable that in addition to having its rates reduced by the Commission to a basis believed to be reasonable and therefore satisfying every proper public demand, the Department of Justice should, for the same reason, ask that the defendant railroad sequestrate itself from most valuable properties at enormous sacrifices and

which were acquired under the legal authority and encouragement of the State of Pennsylvania, in which both the defendant and the companies whose stock it owns were incorporated.

The following excerpt from the opinion in the Court below in this case is appropriate:

> "What is really complained of is the bald fact that the railroad company, by owning the stock of various coal companies, controls and practically owns so much anthracite coal that it cannot be trusted to deal fairly with the rest of the world in the matter of transportation charges, which matter the judicial branch of our government is not content to leave to the regulation of another governmental agency, viz.: the Interstate Commerce Commission" (225 Fed. 404).

(*b*) The history of the Lehigh Valley Railroad anthracite rates and profits as a whole.

In the first place, a brief reference should be made to the portions of the Record in this case which show that the anthracite rates of the Lehigh Valley Railroad Company have constantly declined during all the period that it has owned the stock of the Lehigh Valley Coal Company. Graphically the matter is shown in Railroad Exhibit 40 (4 R., 2289), and in figures is shown in Railroad Exhibit 51 (4 R., 2300). The general decline in anthracite rates is referred to in detail in the Annual Report of the Lehigh Valley Railroad Company for the year 1891 (4 R., 2156). It is referred to again in detail in the Annual Report for 1893 (4 R., 2158). And a complete history of the rates in all directions is contained in Railroad Exhibit 79 (4 R., 2353).

For the purpose of showing the reasonableness of the rates, taken as a whole, various exhibits

were introduced, relative to the financial history of the Railroad Company, its present condition, the returns to its stockholders and the smallness of its capitalization compared with its assets. Mr. Dunn, a member of the firm of Haskins & Sells, Certified Public Accountants, prepared in instructive detail an Historical Synopsis of the Financial Growth of the property of the Lehigh Valley Railroad Company as used in the transportation service, and a copy of it appears in Railroad Exhibit 32 (4 R., 2193). It shows the expenditure of capital in respect of the different subsidiary lines and in what form expended; the expenditures for equipment and other appurtenances and summarizes the whole examination at page 2246 of the Record. A recapitulation of the matter shows that the transportation system of the Railroad Company cost on a basis of cash or equivalent outlay:

Railroad and appurtenances.....	$120,169,768.59
Equipment	61,686,743.38
Real Estate	3,605,068.22
Total.....	$185,461,580.19

Mr. Dunn's firm of Haskins & Sells certifies to the annual report of the Lehigh Valley Railroad Company to its stockholders each year and certifies that the "income and profit and loss accounts for the year and general balance sheet issued at the close of the year" are correct (3 R., 1174). How his testimony in this case can properly be said as the Government has said, to conflict with the certification is impossible to see. The certification is to the effect that the profit and loss account as contained in this annual report, is in accordance with the books of the company, but no certifying auditor is expected

to, nor does he say that he does, go back to every record and voucher and account of every *subsidiary* company and find what each company paid for its property and whether *its* books correctly support the balance sheet it had at the time it was acquired by the parent company. It is the duty of the certifying auditor to see that the balance has been correctly carried from the subsidiary company's books to the parent company's books. Now Mr. Dunn, having been employed by the Company to go back and examine the subsidiary accounts, has done so and finds, as his data shows, that on the basis of cash and equivalent outlay the property cost more than the books of the parent company show and whether the property investment account in the books of the parent company shall be written up to the higher figure is a matter for the officers and stockholders of the company to decide and not a certifying auditor.

In the General Anthracite Rate Investigation before the Interstate Commerce Commission, Docket 4914, elaborate tables were prepared by the various carriers in respect of their property accounts and returns thereon during a series of years and one of these statements was introduced in this case. It is embraced in Railroad Exhibit 73 (4 R., 2338). The property investment figure thereon for the year 1913 is about $11,000,000 higher than Mr. Dunn's figure, due to the inclusion of "Working capital" and it will be seen that for that year the per cent. of return on the property investment was but 6.6 per cent. and that in the last twenty years the highest point reached was 7.9 per cent. in 1905 and in 1902 the lowest point, or 3.24 per cent. This is no unusual return for a company whose stockholders are going to be in a period not very remote

in grave danger of losing all returns if the merchandise freight revenue does not increase in direct proportion to the decrease in coal revenue, which latter is bound to occur through the gradual exhaustion of anthracite mines.

The high and low prices of the company's stock since 1863 are shown in Railroad Company Exhibit 55 (4 R., 2307). Now to show that the Company is greatly undercapitalized, its capital stock amounting to $60,608,000 and its funded debt $95,840,669.18, which latter includes $18,000,000 of securities held in the treasury, an exhaustive study of the reproduction value of the company's assets has been made and a study of their present value, that is, taking the reproduction value and deducting depreciation and adding appreciation where the conditions so warranted. The general methods pursued in making that investigation are set forth in detail in Railroad Exhibit 36 (4 R., 2285). It was done under the charge of Mr. William J. Wilgus, a consulting engineer, a man of long and varied railroad experience, and who was for a period Vice-President of the New York Central & Hudson River Railroad Company. As assistants he had most able and experienced men, whose names and assignments of duties are shown in Exhibit 36, and whose qualifications were stated by Mr. Wilgus as a witness in this case. The summary of his investigation, which occupied altogether nearly a year's time and the services of about one hundred assistants (3 R., 1179), is set forth in Railroad Exhibit 35 (4 R., 2279). It shows a reproduction value as of January 1, 1914, of over $324,000,000, and after deducting net depreciation, over $297,000,000. Now the sole criticism of Mr. Wilgus' work which Government counsel have urged is that the

right of way values were obtained by consulting local real estate men and bank officers at various points along the line and Government counsel have characterized these consultations as "casual" and "hasty conjectures". We might leave out the whole item of right of way and station grounds to which they direct their criticism, which item is shown in Exhibit 35 as $57,428,000, and still have $241,000,000 of value left, to balance against $60,608,000 of stock, about $96,000,000 of bonds, and adding, if you please, about $47,000,000 of subsidiary railway company bonds guaranteed. But that the consultations and examination that Mr. Wilgus and his assistants made in reference to real estate values were not casual or were not hasty conjectures is amply shown by Mr. Wilgus' own testimony in this case and the explanation of his work contained in Railroad Exhibit 36. Certainly there are no more competent advisers as to real estate values than local real estate dealers and local banks which lend money upon real estate security.

Mr. Wilgus also made an examination which proved corroborative of Mr. Dunn's in reference to the financial history of the company and has shown the results in the following Exhibits:

1. The corporate and construction growth of the Company, that is, its mileage development (Railroad Exhibit 37, 4 R., 2286);

2. The growth of the capital obligations of the Company (Railroad Exhibit 38, 4 R., 2287);

3. The dividends paid, and the reserve and surplus, where there was such, throughout its history (Railroad Exhibit 41, 4 R., 2290);

4. A graphic representation of its operating expenses, rentals and fixed obligations, dividends paid, and accumulated surplus (Railroad Exhibit 42, 4 R., 2291);

5. A list of its average capital obligations, issued and assumed, and the rate of return thereon through the history of the Company (Railroad Exhibit 43, 4 R., 2292);

6. A graphic representation of the rates of return received by the holders of its funded and unfunded capital obligations (Railroad Exhibit 44, 4 R., 2293);

7. A graphic representation of the rates of return received by the holders of its capital obligations taken as a whole (Railroad Exhibit 45, 4 R., 2294);

8. A statement showing the comparison of the actual and minimum fair returns received by the holders of its capital obligations throughout the history of the Company, using as the basis of a minimum fair return, 10 per cent. in the earliest period; 8 per cent. down to 1870; 7 per cent. down to 1890 and 6 per cent. since that time. There is an accumulated deficit in such minimum fair return, of over $20,000,000, or an average yearly deficit of nearly $500,000 (Railroad Exhibit 46, 4 R., 2295);

9. An exhibit showing graphically the above result (Railroad Exhibit 47, 4 R., 2296).

Mr. Dunn also made up a special report in respect of an examination of the property accounts of the Company relative to its transportation sys-

tem, the results of which appear in detail in Railroad Exhibit 33 (4 R., 2255), and showing in another form the fact that based on a fair rate of return to the holders of its funded and unfunded capital obligations the Company has been anything but prosperous. The Statement in the Record, page 2272, is a detailed corroboration of Mr. Morrison's property investment account contained in Railroad Exhibit 73, above mentioned, and shows in addition the deficiencies of income as compared with 6 per cent. on the average capital invested and employed in the transportation system. The whole fallacy in respect of the alleged highly prosperous condition of the Lehigh Valley Railroad Company is due to the fact that its capitalization is so much less than the value of its assets, and the failure to realize that the owners of the company are entitled to a fair return upon the value of their property, measured at least by the cash and equivalent outlay therein, and not by the particular face value of the certificates they have in their possession.

(c) Rates in relation to coal prices.

That a rate reduction of the character in the *Meeker Case*, or in Docket 4914 has no direct relation to the price of coal, even giving full effect to the Commission's order as to reasonableness, is clear from the testimony of Mr. Coyle, Sales Manager of Weston, Dodson & Company, which Company sells for the Beaver Brook, Morea and the Weston Collieries. His testimony in this respect was (3 R., 2021):

> "Q. What was the effect on the price of coal at New York and vicinity after the rate of $1.40 was put into effect following the opinion of the Interstate Commerce Commission in the

Meeker Case? A. There was no effect on the price at New York, possibly on account of the small aggregate tonnage involved, but certainly, whatever the cause, there was no change in price, due to that change in rate."

Moreover, Mr. W. M. Bertolet, Secretary of the Pennsylvania Retail Coal Merchants' Association, having about nine hundred and fifty members, testified that he had held that position ten years; that he had kept thoroughly familiar with conditions surrounding the transportation and sale of anthracite coal, and that a reduction in freight rates would have no effect upon the retail price of coal to consumers, unless it were a considerable reduction; "for example, if the freight rate were cut in half, undoubtedly there would be a reduction in the retail price" (3 R., 2983). It is needless to say that to cut any of the existing coal rates in half, or anywhere near it, is beyond the domain of any reasonable consideration; and that the rates as they exist are no more than fairly compensatory, and for many years were not even that, is made clear in the subsequent discussion.

(*d*) The local rates under competitive conditions.

A great deal of space in this Record has been taken up by the Government in respect of certain correspondence which took place several years ago between officers of the Lehigh Valley Railroad Company and others, and officers of the Delaware & Hudson Company and the Ontario & Western Railroad Company. The correspondence with the officers of the Delaware & Hudson Company related to a proposed reduction by that Company of certain anthracite rates on traffic going into New England. The correspondence with

the Ontario & Western Railroad Company related to certain proposed reductions by that Company of anthracite rates on traffic to New York Harbor. If a railroad thinks its rates are reasonable—and, as has been shown above, the Lehigh Valley Railroad has ample reason for believing that its rates are no more than reasonable and no more than compensatory—then it has the right to and indeed its duty to its stockholders' demands that it should in every legitimate way protect those rates against destructive competition. The whole burden of that correspondence is simply an effort to persuade the competing lines not to reduce competitive rates because it would mean corresponding reductions in the rates of the Lehigh Valley Railroad Company.

It is submitted that it was entirely a lawful and proper action. Since the Hepburn Act the days of rate-cutting have ceased. It takes thirty days to put a rate into effect, but the days of competitive rates are still here, and Mr. Grier testified and naturally and properly said that he would take the same kind of action to-day. It is a far cry beyond reason to say that railroads shall engage in cut-throat competition. The rates of the weaker control the rates of the stronger, and if a weak line, to get a larger supply of traffic, cuts a reasonable rate, knowing that an increase in deficit does not mean much to it anyway, certainly the stronger line is legally and morally justified in persuading it to let competitive and reasonable rates stand (1 R., 337).

In the old Reading Case the petition of the Government was necessarily predicated upon an existing competition between the then defendant anthracite carriers, and its petition recited at great length how those defendants competed at the different dis-

tributing centres. (*U. S.* vs. *Reading Co. et al.*, 183 Fed., 432, 457.) When the case reached the Supreme Court of the United States (*U. S.* vs. *Reading Co. et al.*, 226 U. S., 324), the Government's Brief, as summarized at page 329, expressly took the position that "railroads engaged as defendants are in transporting coals of the same kind from a sole and restricted area of production to the principal market, are competitive, although their tracks may not reach the same mines." That a relation existed betwen the competing anthracite carriers' rates at the distributing centres, due to the competitive situation, was also recognized by the Interstate Commerce Commission in the *Marian Coal Company Case*, 24 I. C. C., 140; 25 I. C. C., 14, and has again been clearly recognized by the Interstate Commerce Commission in the establishment of the rates it has ordered for all the anthracite carriers in Docket 4914. What is the effect? Both on the east and the west the Lehigh Valley Railroad is confronted by the competition of the other originating anthracite lines. It is parallel to the Central Railroad of New Jersey all the way to Phillipsburg in N. J. It is side by side with the Central Railroad of New Jersey again at Bound Brook, and is virtually parallel with it all the way to New York. So, also, in New Jersey it meets the direct competition at various line points of the Reading Railroad and the Pennsylvania Railroad, and when it goes to Jersey City and New York, the additional competition of the Lackawanna, the Erie and the other lines above mentioned. On the west, as soon as it crosses the state line of New York, it meets the Erie and Lackawanna; meets the competition of the Lackawanna again at Ithaca; the competition of the New York Central in conjunction with the Reading at Geneva; and the com-

petition of the Erie and New York Central again at Rochester and Buffalo (Railroad Exhibit 34, 4 R., 2278). These are but a few of the points. Those rates being strictly competitive we have everything that Congress intended to bring about by the Sherman Act, and everything that the Government seeks to bring about by its enforcement.

In its Brief in the Court below, Government counsel said at page 37: "True the development of the railway system in this country is so extensive that the towns and villages which are reached by only one railway are, as a rule, comparatively small places." But even as to those small places or intermediate points there is an invariable rule for the establishment of their rates. The Interstate Commerce Act (Section 4) provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance. * * *"

It is provided that the Commission may relieve a common carrier from the operation of the section upon proper showing. Therefore, the competition at the numerous points where the Lehigh Valley Railroad along its line meets other anthracite carriers, governs its rates, not only at those points, but at the intermediate points, by reason of the prohibitions of Section 4, above quoted.

So far as the present situation is concerned, and the alleged power of the railroad company to foster or aid in any way an anthracite coal monopoly by reason of its rates, the only other reference which need be made is to the testimony of the shippers who produce or buy anthracite at points on the Lehigh Valley Railroad Company, other than the Coal Sales Company, and who testified as to the volume of tonnage they sold and how they competed freely at every point along the Lehigh Valley Railroad, in former years with the Lehigh Valley Coal Co., and now instead with the Lehigh Valley Coal Sales Company, and among each other and with other competitors who ship via other lines to common points. They were as follows:

H. C. Barr, Sales Manager for J. S. Wentz and Midvalley Coal Co. (3 R., 2045).

Wm. R. Coyle, Sales Manager for Weston, Dodson & Co., Inc. (3 R., 2017).

Robert C. Hill, Vice-President, Madeira Hill & Co. (3 R., 1944).

Chas. H. Jacobs, member of the firm of Whitney & Kemmerer (3 R., 1713).

Wilson Kishbaugh, General Sales Agent, Mill Creek Coal Co. (3 R., 2034).

Wm. R. McTurk, President and principal stockholder, Hazle Mountain Coal Co. (3 R., 1845).

S. B. Thorne, member of the firm of Thorne, Neale & Co. (3 R., 1865).

(5) *No unjust discriminations involved.*

(*a*) Leases of land to Lehigh Valley Coal Sales Company.

It is no doubt true that it is to the advantage of a large producer or seller of anthracite to have

storage plants located near the principal markets, as he is able to ship his coal to the storage plant in the summer, when the demand is small, the price is low, and the car supply is plentiful, and the producer is benefited because he may continue his operations through the summer, and keep his expensive machinery working and hold his forces of miners together. The Government has named five localities, namely, South Plainfield, Newark, Jersey City and Irvington, N. J., and Rochester, N. Y., and said that the Lehigh Valley Railroad built five storage plants, one at each of these localities, but that remark is so incorrect that only the fullest measure of charity can make one believe that it was unintentional. A reference to Lehigh Valley Coal Sales Co. Exhibit 3 (4 R., 2449), shows the facts. The property at Newark is a covered trestle, referred to in the Exhibit as "retail pockets" and having a storage capacity of 9,460 tons. The property at Rochester is shown on the exhibit as "retail pockets" and has *no* storage capacity. The property at Jersey City is also described as "retail pockets" and has a storage capacity of 4,794 tons. The property at Irvington is described as "retail pockets" and has a storage capacity of 786 tons.

The property at South Plainfield therefore is the one left and is specifically described on the exhibit as "storage plant," having a capacity of 310,000 tons. If there was a discrimination in the past in exacting only 2.92 per cent. rent for it, nobody was ever heard to complain of it, and for the obvious reason that every competitor of the Lehigh Valley Coal Company had his coal stored free and was, therefore, in pocket $7,500 or some less amount each year. Up to June, 1913, the Lehigh Valley Rail-

road maintained enormous bins for the storage of coal at Perth Amboy open to every shipper on its line and when the Coal Company paid $7,500 a year rental to the Railroad for its land at South Plainfield it just left that much more room in the general bins at Perth Amboy, where all its competitors stored their coal *free*. But what is the situation at present? For the South Plainfield storage plant the Lehigh Valley Coal Sales Company, which has succeeded to the lease, pays a rent of $10,247, which, plus the taxes, maintenance and insurance, makes a rate of rental of 7.53 per cent. (1 R., 104), a rate which nets the Lehigh Valley Railroad Company 4 per cent. clear. This, in the judgment of Government counsel is not enough and involves preference, but if it is not enough we would like them either to qualify as experts, after making themselves familiar with rental values at South Plainfield,—which has that title by courtesy, as there is nothing within miles of it but unimproved land,—or else produce experts who are already familiar with rental values in that locality. As they have done neither we are content to let the justness of this rental, as well as the justness of the rentals now exacted from the Coal Sales Company for the bins—not storage plants—at the four other localities rest with the Court. Each of those other rentals nets the Railroad Company at present 4 per cent. clear. Taken with the taxes, maintenance and insurance paid by the lessee, the rate of rental borne by the lessee is over 5½ per cent. in each instance and nearly 6½ per cent. for the Rochester pockets, based upon a valuation made by a disinterested expert, Mr. Wm. J. Wilgus, formerly Vice-President of the New York Central

and now a consulting engineer, in conjunction with a corps of special assistants.

In respect of rental charged, the Court below in this case found as follows:

> "But the Lehigh Valley Railroad owned certain lands useful only for storing coal, the coal company had certain coal on hand, and the plan of an independent sales company was new. What should or could be done with the lands and coal on hand, and how could the concern retiring from the selling business insure the creation of a strong and pushing successor? Certainly not by hostility. Who would or could buy the coal on hand and occupy and use the storage plants except the coal sales company? But (says complainant) the prices were ridiculously low. Answer is justified that: (1) The assertion is untrue, and (2) it was praiseworthy and lawful at first to sacrifice much in price when the object was to save from further assault the business of selling coal after interstate transportation—a business that had become precarious owing to modern economics as asserted in statutes and interpreted by the courts" (225 Fed., 399, 401).

(*b*) The Storage Case.

Up to June, 1913, the Lehigh Valley Railroad Company gave all anthracite shippers on its lines the privilege of free storage in the bins at Perth Amboy. In the early part of 1913 the Transportation Department told the Coal Traffic Department that there was an urgent demand for more room to increase yard facilities at Perth Amboy (1 R., 342). Moreover, the storage bins which were occupying this needed room were over forty years old, and the maintenance cost had become very heavy. Third, was the danger of fire, which involved heavy insurance, and fourth the fact that

no other railroad company provided similar facilities free of charge. The Lehigh Valley Railroad, therefore, in June, 1913, cancelled the free storage privilege—shippers being given two years in which to take out the coal then there. The tariff canceling this privilege was sent to the Interstate Commerce Commission, and the Plymouth Coal Company applied to the Interstate Commerce Commission asking its suspension. The Commission held a hearing at which both the complainants and the Railroad Company were represented, and refused to suspend the tariff (3 R., 2055). Thereupon the Plymouth Coal Co. together with Weston, Dodson & Co. and the G. B. Markle Co. filed a formal complaint before the Interstate Commerce Commission, copy of which is contained in Railroad Exhibit 91, Record, 2415, and a copy of the Railroad Company's answer thereto is contained in Exhibit 92 (4 R., 2423).

The legality of the Railroad's action has since been sustained by the Interstate Commerce Commission in said proceeding, the complaints, after full hearing, having been dismissed. *Plymouth Coal Co.* vs. *L. V. R. R. Co.*, 36 I. C. C., 140 (July 30, 1915). See also *G. B. Markle Co. et al.* vs. *L. V. R. R. Co.*, 37 I. C. C., 441 (Dec., 1915).

(*c*) The Demurrage Charges.

Like the charge of discrimination relative to the storage at Perth Amboy, here again is a charge involving the reasonableness of one of the defendant's tariffs relative to the establishing of demurrage rules for the handling of cars at Perth Amboy. It is a tariff which is applicable to every shipper alike, and is a tariff exactly similar to that which was sustained by the Interstate Commerce Com-

mission in the case of *Peale, Peacock, Kerr et al.* vs. *Central Railroad of N. J.*, 18 I. C. C., 25 (1910). The Commission has since this case was tried and heard below, sustained the legality of the immediate tariff in *Plymouth Coal Co.* vs. *L. V. R. R. Co.*, 36 I. C. C., 140 (July 30, 1915). *G. B. Markle Co. et al.* vs. *L. V. R. R. Co.*, 37 I. C. C., 441 (Dec., 1915).

The Sales Manager of Weston, Dodson & Co., one of the complainants in the first of the above cases, said he had no complaint in reference to the fair and impartial application of the tariff, but only as to its relation to the storage of coal (3 R., 2021).

(*d*) Operating Matters.

The two superintendents whose jurisdictions taken together cover the movement in the coal regions in respect of every colliery operated by companies other than the Lehigh Valley Coal Co. and Coxe Bros. & Co., as well as the collieries of the latter two companies, were witnesses in this case. Mr. Shea, the Superintendent of the Wyoming region, testified that he was the "czar" of his division; that he never held any position in the Lehigh Valley Coal Co. or any other coal company; that he never had anything to do in any way with coal mining operation, and that no discrimination existed in any form by way of distribution of cars, or switching or otherwise between different shippers of coal in his territory (3 R., 1431). Coming now to the Lehigh region, Mr. Gilroy, superintendent of the Mahoney and Hazleton division, said that he was the man who actually ran the M. & H. division of the Lehigh Valley Railroad; that he had nothing to do with the mining business and never had (3 R., 1426), and that on his division there is

no discrimination in any way, either in the distribution of cars, switching facilities, hauling of cars, or any other kind; and that the Lehigh Valley Coal Sales Co. and all other shippers on his division were treated exactly alike. His candor and frankness and absolute sincerity are well reflected in the following question and answer:

> "Q. Are they all treated exactly alike? A. They are as near as a man can do it" (3 R., 1420).

Mr. Grier, the Coal Traffic Manager of the Lehigh Valley Railroad Company, testified on the point of service as follows (1 R., 343, 344):

> "Q. Is it your effort to avoid as far as possible any discrimination in respect of any service or facilities of any kind between all the different shippers of anthracite on the Lehigh Valley? A. Yes; we are eternally engaged in that occupation of trying to see that everybody is treated alike and trying to see that there is no discrimination anywhere, at any place, and sometimes when we feel we are all right, to make doubly sure, we will have further investigation to feel ourselves satisfied that everybody is getting just exactly the same as everybody else gets.
>
> "Q. Do you know of a single favor that has been extended to the Lehigh Valley Coal Sales Company?
>
> "Mr. Machen: Objected to.
>
> "A. No, sir: I answer that I know of none other than what would be given to any other shipper of coal over the Lehigh Valley Railroad.
>
> "Q. They transport and handle every pound of their traffic in accordance with the rules and regulations of the tariffs which we publish? A. Yes, and file with the Interstate Commerce Commission, and every other shipper's busi-

ness is handled under the same tariffs and regulations.

"Q. Do you from time to time have calls from the examiners of the Interstate Commerce Commission? A. Yes.

"Q. Have you talked to them? A. Yes, freely.

"Q. Has any of them talked to you about the conditions respecting the anthracite traffic on the Lehigh Valley Railroad? A. Yes, at times.

"Mr. Machen: I object to that question and answer.

"A. (Continuing). I had one of the Interstate Commerce Commission Inspectors in my office yesterday morning; he came and enquired regarding the Bee Line and we gave him all the information he asked for and some additional he did not ask for and he was very much pleased and satisfied and said that information I gave him would relieve him of a great deal of work.

"Q. Has any of those examiners at any time ever raised any point with you or mentioned in any way any favors extended to the Lehigh Valley Coal Sales Company?

"Mr. Machen: I object to the question.

"A. No, sir.

"Q. Have those examiners from time to time called your attention to small matters, or maybe even large matters, which should be corrected by the tariff or changed by the tariff?

"Mr. Machen: Objected to.

"A. I don't believe the Interstate Commerce Commission found any practice of the Lehigh Valley Railroad was not covered by the tariff.

"Mr. Machen: I object to that answer as not only irrelevant but irresponsive.

The Witness: Well, they never expressed themselves to me.

"Q. If you had your attention called to any favor or any matter which savored of discrimination in favor of the Sales Company, would you correct this to put them on a basis of other shippers?

"Mr. Machen: I object to that.

"A. Yes."

(c) Collection of Freight Charges.

Another point is the collection of freight charges at the present time and in the immediate past from the Lehigh Valley Coal Sales Co. Mr. Morrison admitted that the Lehigh Valley Coal Sales Co. after it began its business, in March, 1912, did not pay its freight bills as promptly as he thought it should, and he took steps immediately to correct the matter. Mr. Morrison, the General Auditor of the Railroad Company, testified that the United States Government was "about the slowest patron we have" (3 R., 1349), taking ordinarily more than four or five months and sometimes six and eight, to pay its freight bills on the merchandise it ships and for the transportation of the mails. He said that when he found the Lehigh Valley Coal Sales Co. was a month or more behind in its bills he went to see Mr. Wilson, the vice-president of the Company, and the rest of his testimony on the point should be quoted (1 R., 419):

"Did you ever speak to the President of the Lehigh Valley Coal Sales Company about the fact that he was not paying his statements as promptly as you thought he ought to? A. I went after—not the president at that time, he was vice-president, he is president now—this was how we came to change it: I came over here and found fault with his not paying his bills as promptly as he ought to and I told him that they had to be paid up and we must get

> our money, and he said well, I will pay up. Well, I said, you'll do more than that because I am going hereafter to make statements with you like other shippers and draw on you; and we talked it over and he finally consented to that and to pay up, that is, all the bills within a short time, and after that we drew on the Lehigh Valley Coal Sales Company exactly the same as we do on small shippers on the railroad."

That conduct speaks for itself and needs no justification. The payment of freight charges by the Lehigh Valley Coal Co. in the former years is taken up in a later part of this brief.

(*f*) The leases of yards and trestles to dealers.

So far as the shipping clauses which formerly were in such leases are concerned, they have no bearing on this branch of the case because they are no longer in existence, having been stricken out of every lease except two before this suit was begun. This action was taken on advice of counsel, due to the fact that the Interstate Commerce Commission had instituted a criminal proceeding at Buffalo, in respect of which a verdict of "Not Guilty" was rendered by the jury after a trial (Railroad Exhibit 68, 4 R., 2333), and in which an attempt had been made to show a connection between the shipping clause and the rate of rental. As the shipping clauses had long been dead letters in every one of such leases counsel advised that they be stricken out upon agreement with the lessees in order that no question relative thereto might arise in the future (1 R., 110). The two exceptions were the leases to the Greenville Coal & Ice Company and to the Wertheim Coal & Coke Company. As to the former, the clause requiring the tenant to route all his ship-

ments over the Lehigh Valley Railroad Company is still in the lease, because the lessee, having never been bothered about the clause, and fearing its eradication like a leap in the dark from a clear light he is now satisfied with, *refuses to agree to its elimination.*

As to the Wertheim Coal & Coke Company lease, the judicial records in Hudson County, New Jersey, will show that since this case was tried the bondholders of the Wertheim Company, the two largest in interest being independent coal operators, have caused a receivership of said company under the terms of their mortgage. This action *ipso facto* by the terms of the lease, canceled it.

So far as the present situation is concerned, therefore, these shipping clauses have no bearing on the case. Their relation to the past situation has never been made clear nor can it be. They were outnumbered by thousands of clauses in leases to dealers in other commodities, and of the 272 leases to coal dealers, but 118 had these clauses in and in but *one* of them was *anthracite coal* mentioned. Their observance was never followed (1 R., 110) and their use was purely perfunctory (1 R., 130). A similar clause is found as far back as 1884 in a contract relative to a "boiler plant" (4 R., 2189) and in 1888 in a contract concerning the acquisition of some right-of-way property (4 R., 2185).

As to the rentals in those leases they were made in each case at the best terms obtainable. If a railroad company, having a piece of surplus land, is able to rent it, the rental it receives is just that much contribution toward fixed charges and that much gain, and there is no unlawful discrimination involved in that action, unless a competitor

of the lessee can show that the railroad company has a substantially similar piece of land which he wishes to lease and that the railroad company either refuses to lease it to him or demands a higher rental than is exacted from the first party, —his competitor. While it is true that, based upon an expert valuation of each tract, a definite and specific rate of rental is not exacted from these lessees, nevertheless, there has not been the slightest effort made by the Government to show, because it could not be shown, that in any one of the cases the Railroad Company fixed the rental at a rate lower than it might have secured. To say that the Railroad Company must let a piece of surplus land lie idle because it cannot obtain a fixed rate of rental, based upon an expert valuation of the land is false economics and bad law. If the rental exacted from a tenant is with knowledge and intent fixed at a figure lower than he might be willing to pay, it may be said to involve a rebate if the tenant is a shipper over the Railroad. That was the contention of the Government in the Yates-Lehigh Case,—the indictment at Buffalo referred to above—*but*, as the Court there charged the jury, it is necessary that the Government show that the parties fixed the rental with intent to create a preference or give a rebate (Railroad Exhibit 67, 4 R., 2321). There was not a scrap of evidence of that kind in this case.

Mr. Foster, the General Land and Tax Agent of the Lehigh Valley Railroad Company, testified that he tried, in every instance, to get as much rent from each tenant as he could; that that was part of his duties; that these leases of land, where the property is to be used as a coal yard, have been treated exactly the same as a far larger number of

leases where the property was to be used for other purposes, as is clear from an examination of Railroad Exhibit 3 (4 R., 2073). At each city where the Government has referred to leases to coal dealers, the other leases which were in existence at those points were examined for the purpose of finding the relative rates of rentals, and the results are shown in Railroad Exhibit 3 (4 R., 2073). The most cursory examination of it will show the futility of the Government's contention that any preferential treatment was involved. At virtually every point the leases to other than coal dealers outnumber many times those to coal dealers, and in nearly every instance the square foot rate of rental to the coal dealer is higher than the square foot rate of rental to the others and the much more numerous class. Mr. Foster testified that he had in effect some four thousand leases, and of those, not more than two hundred and seventy-two were to coal dealers, and that of those four thousand some of them extended back to 1870. It is submitted that in the absence of some showing that the rate of rental has worked a preference or a discrimination, or a showing that it was fixed with an intent to violate the law against rebating, every principle of reason and economy justifies the railroad in renting its surplus land at the best figure it can get, and would condemn it if it let the land lie idle merely because some theoretical rate of rental could not be obtained. It is purely a question of demand and supply. The best rent that the dealer will pay is so much in the railroad's pocket, and to refuse his offer because it did not meet a theoretical standard would be so much loss.

Neither the *Hirsch Case*, in 204 Fed., nor the *Union Stockyards Case*, in 226 U. S., decides any-

thing to the contrary. In fact, a close examination of the Hirsch Case will show that it supports the theory above mentioned. The whole point of the Hirsch Case was that the rental had been fixed lower than otherwise might have been obtained because the tenant agreed to give the railway company the transportation of all his freight. The law on the subject is also sensibly and aptly expressed by the Court in its charge to the jury in the Yates-Lehigh Case (4 R., 2321), and there is not a line of testimony in this record to show that the shipping clauses, which formerly existed in many of the leases had any relation whatsoever to the amount of rental the tenant was obliged to pay. Some of those clauses began with the words: "In consideration of the low rent," etc. But Mr. Foster testified that that clause had been used for many years before he came with the Company, and that he knew of no rent that had been made lower than could otherwise have been obtained, because the shipping clause was in the lease. It is like the "one dollar" clause in millions of deeds and agreements; nobody ever saw the one dollar change hands. But even giving them the most unfavorable construction, there has been no showing that those leases involved an intent to monopolize the transportation or the sale of coal, because a reference to Railroad Exhibit 2 (4 R., 2064) will show that at virtually every point where there is a lease to a coal dealer there are a far greater number of leases to dealers in other commodities, which leases contained the same kind of clause.

In the case of *Bigelow* vs. *Calumet & Heckla Mining Company,* 167 Fed., 704, it was held that the Interstate Commerce Act should be interpreted *in pari materia* with the Sherman Act. "It should

be held that the contract does not violate the Act to Regulate Commerce merely as it may be construed incidentally or remotely involving payment of a rebate. If its main object and chief effect is to promote the lawful business and increase the lawful trade of the parties making it, it is not prohibited by law." These leases of surplus land in various cities, towns and villages enable the dealer to carry on his trade. If he had to pay more rent than his competitors located on another line in that town he couldn't exist and, therefore, in every town where there are two or more competing railroads this feature, like the other features of this case, becomes strictly competitive. And if the Lehigh Valley gets all it can by way of rental, then certainly, other things being equal, it need not let the property stand idle. Such leases promote trade and foster competition and are in every way to the public interest. The New York Central made them and it has no interest in any coal company. And Mr. Wilgus testified that he knew, based on his wide railroad experience, that companies generally make them (3 R., 1209); that on the New York Central in some cases the occupant of the property had executed no lease at all and in others the amount of rent was merely nominal (3 R., 1233).

The statement in the Government's Brief in this Court (p. 59) that the Railroad *had bought up coal yards for the purpose of leasing them to shippers* (the clear inference intended from the wording of the paragraph) is untrue, and not warranted by a single statement of fact in this Record.

(*g*) The Presumption of Innocence.

In the *Northern Securities Case,* 193 U. S., 197, Mr. Justice Holmes, at page 401 said, referring to the Sherman Act:

> The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make such acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.

Therefore every phase of the Government's case in reference to preferential treatment or unjust discrimination, if it is of any bearing in this case at all, must be proved, and must be proved by a preponderance of evidence. Moreover, there has not been a single charge brought forth in reference to preferential treatment or unjust discrimination which is not under the principle set forth in the *Abilene Cotton Oil Case,* 204 U. S., and in the *Balto. & Ohio Case,* 222 U. S., mentioned above, a matter for the primary—and exclusively the primary—jurisdiction of the Interstate Commerce Commission; and, as has been shown, not one of these charges involving possible violation of the Interstate Commerce Act has ever been brought before that body and determined adversely to the Railroad. Nor is there any presumption that this defendant Railroad Company, because a majority of its stockholders own a majority of the stock of the Lehigh Valley Coal Sales Company, intends to or is going to be guilty of any infringement of the Interstate Commerce Act. The theory was

well expressed by Judge Gray in the first Commodities Clause case, *United States* v. *Delaware & Hudson Company et al.*, 164 Fed., 215, where he said at page 245:

> Applying the philosophy of this case to those before us, it is obvious that, instead of a competent and efficient regulation of commerce, directly dealing with the evil of the situation, by explicitly forbidding and penalizing all such discriminations in freight rates as were possible of commission under guise of the ownership of the commodity carried, the enactment in question has excluded from interstate commerce all commodities owned by the carrier, whether their transportation be carried on in conformity with the legal requirements against discrimination, or not. Such an exclusion can only be justified by the assumption that a carrier, who transports his own coal, as well as that of others, must discriminate. It could hardly be more unreasonable to forbid the burning of coal on the locomotives, and compel a resort to wood for fuel, because the carriage and distribution of such coal might furnish the opportunity for the attempt to discriminate in freight rates, as to the coal necessarily remaining after the preparation of coal for their own steam purposes.

And again, even giving full scope to the Government's contention, which in every respect is based upon a theory that violations of the Interstate Commerce Act, if proved, are sufficient as evidence under the Sherman Act, *because they may show a tendency to monopolize,* it may be said that it was certainly no intention of Congress that a carrier should be deprived under the Sherman Act of enormously valuable property at an untold sacrifice merely because a majority of the

stockholders of the carrier are also a majority in interest of the stockholders of the principal shipper over its rails, and might, therefore, by some style of reasoning be considered to have a desire to accord such shipper preferential treatment. If there is such preferential treatment the Interstate Commerce Act prescribes directly the method for its correction. The remarks of Mr. Justice Gray in the case last cited are also pertinent in this respect where he spoke of the desire of the Government to oblige carriers to sell their coal stocks at an enormous sacrifice in the enforcement of the Commodities Clause, simply because the ownership of those stocks might tend to a violation of other sections of the Interstate Commerce Act:

> The provision, that no person shall be deprived of liberty or property without due process of law, would, indeed, be shorn of its vitality if the contention of the government in the premises can be sustained. If, without regard to the exigence of the fifth amendment, we merely compare the consequences of this so-called regulation of commerce to the property and property rights of these defendants, with what we are told is the end to be achieved by this so-called regulation of interstate commerce, the utter unreasonableness of the said regulation will still more clearly appear. A property right, of almost incalculable value, which these defendants have hitherto innocently enjoyed in common with the citizens of Pennsylvania and of all the other states, is stricken down *for the alleged purpose of preventing discrimination by common carriers, as owners and carriers of such property, as against others who may lawfully require their services.* It hardly needs pointing out, how enormous the disparity between the value and importance of the end accomplished and

the cost of the means employed for the accomplishment; and this, too, when any such discrimination, if it exists, can be remedied by regulations bearing a direct relation thereto. But, to further make the disparity between the means and the end to be accomplished more apparent, it is not because such discriminations are practiced, but because they possibly may be practiced."

The observation is all the more apposite here where there is so slight a channel of connection between the carrier and the shipper of the commodity.

It was pertinently said by the Court below in this case:

"The theory is compendiously shown by the following extract from the brief submitted:

"'Carrier Analogous to a Judge.

"'The truth is, where a common carrier, charged with the semi-judicial duty of holding the scales even between various shippers who compete with one another, and of rendering impartial service to all alike, proceeds to buy up the business of some of these competing shippers, the case is as if a judge upon the bench should proceed to buy up the claims of some of the litigants in his court. The one practice restrains trade and fosters monopoly as much as the other would hinder justice and promote corruption.'

"This delightful *argumentum ad judicem* shows that what is really complained of is the bald fact that the railroad company, by owning the stock of various coal companies, controls and practically owns so much anthracite coal that it cannot be trusted to deal fairly with the rest of the world in the matter of transportation charges, which matter the judicial branch of our government is not content

to leave to the regulation of another governmental agency, viz., the Interstate Commerce Commission" (225 Fed., 404).

(6) *The avenue of commerce has not been unlawfully restricted or monopolized.*

As to the production of coal, the Lehigh Valley Coal Company owns but 22.3 per cent. of the unmined tonnage naturally tributary to the Lehigh Valley Railroad, and Coxe Brothers & Co., Inc., own but 4.56 per cent. thereof. Coming to the coal production and shipments, Railroad Exhibit 52 (4 R., 2301) shows that the total tonnage produced at the collieries connected with the Lehigh Valley Railroad during the year ending June 30, 1913, was a little over 16,000,000 tons. Of that tonnage, 9,000,000 tons was purchased at the collieries by the Lehigh Valley Coal Sales Company, which is free to ship it to any points it wishes and over any railroad it wishes. Because of the topographical conditions many of the collieries cannot be reached by other railroads and, therefore, whoever buys or ships coal from those collieries must at least ship it at part of the distance over the Lehigh Valley Railroad, but that is a condition over which the Company has no control. Of the total tonnage produced at the above collieries, about 13,000,000 tons were shipped over the Lehigh Valley Railroad in revenue haul, or 4,000,000 tons more than were purchased by the Sales Company. That 4,000,000 tons of anthracite was shipped by its producers over the Lehigh Valley Railroad Company as originating carrier and was free to come in competition at every point along the line of the Lehigh Valley Railroad with the tonnage which the Sales Company had for sale at those points. In other words, there in itself was a potential and

actual competition of one-third of all the tonnage produced against the other two-thirds.

Now, the general disposition of all the anthracite carried by the Lehigh Valley Railroad Company is shown in Railroad Exhibit 53 (R., 2303) covering the year ending June 30, 1913. Of the thirteen million tons of coal carried in revenue haul by the Lehigh Valley Railroad Company in the year ending June 30, 1913, but three million odd was delivered to local points (4 R., 2304), so that the tonnage shipped by others than the Coal Sales Company over the Railroad, being more than four million tons, was ample to meet the needs of local points, and must necessarily, therefore, have been a most potent factor in the competition at those points, irrespective of the actual competition which came from producers along other railroads through their ability to reach local points on joint rates and switching charges, and irrespective of the potential competition that exists through the power to have switching charges and through routes and joint rates established by the Interstate Commerce Commission.

Moreover, as had been shown above, there exists through the power of the Interstate Commerce Commission to establish joint rates and to establish reasonable switching charges and through the present existence of switching charges at various points and joint rates from collieries on other lines to various points on the Lehigh Valley Railroad, a further potential and actual competition which the above 13,000,000 tons, the whole of which was originated on the Lehigh Valley Railroad, might meet at every city, town and village along the Lehigh Valley Railroad, from the voluminous tonnage which originated on the lines of its competing

railroads. The total tonnage carried by all of the lines in the year 1913, amounted to nearly 70,000,000 tons (Railroad Exhibit 56, 4 R., 2308).

A further factor and one which has been recognized both in the former "commodity clause" cases and the old Reading Case, is that at every point where two or more anthracite carriers reach the same city or town, shippers on each are in direct competition with each other and among themselves, because the dealers in each such town are in competition for the trade of their customers and the competition of those dealers is reflected back to those from whom they purchase their coal.

Again, Government Exhibit 70 (2 R., 823) shows that about 14 per cent. of the anthracite shipments of all the roads in 1913, and in the previous year about 15 per cent. are sizes smaller than prepared; and such coal at all points comes into direct competition with bituminous. Moreover, at many western points anthracite meets the competition of natural gas.

Of the nine million tons purchased by the Sales Company, 11 per cent. is shipped to New York tidewater points alone (Railroad Exhibit 5, 4 R., 2110), and of that amount about four-fifths is sold in New York and Brooklyn (4 R., 2509), meeting the competition of the voluminous tonnage carried to New York Harbor via seven other anthracite carriers.

Judge Hough's views in the Court below in respect of the "territorial unit", as the Government there characterized its theory of the case, were expressed as follows:

> "It cannot be charged, and is not asserted in argument, that monopoly exists because of the control of so small a portion of anthracite acreage as has been stated above; nor yet in

the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers. So there is found, in the very large proportion which the coal from the Lehigh lands bears to all the coal carried by the Lehigh Railroad, a monopoly within the *'territorial unit'* consisting of the lands presently reached by the Lehigh Railroad.

"This doctrine of territorial unit is a novelty which I do not think bears investigating, for all that it does or can amount to is this (under existing decisions): The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce; for said relations begin, exist and end within the limits of the state of Pennsylvania, and are there entirely legal."

III. The leases of coal lands.

In the first place, there is not a scrap of proof in this case that the Lehigh Valley Railroad, as the petition alleges, ever caused the Lehigh Valley Coal Company to lease any of its lands to tenant operators. The Lehigh Valley Coal Company did, however, lease some of its lands to tenant operators and required them to ship the tonnage produced over the Lehigh Valley Railroad, but, with one exception, the clause requiring such shipments appears never to have been known to the Railroad Company (3 R., 1138). At the outset the insignificance of the acreage embraced in these eleven leases containing these routing or shipping clauses is evident from an examination of Government Exhibit 120 (2 R., 977). But what other effect they had, or could have, other

than to throw that much more coal into the general sales competition along the Lehigh Valley Railroad, and thereby promote the flow of commerce, is hard to see. There was nothing said in the leases as to where the operators should ship their coal, or how they should ship it, or in what quantities they should ship it, or as to what they should sell it for, or as to how much they should mine, or any other factor relative to the entire freedom of the lessee to do with the coal as he pleased (1 R., 439), except that he was to ship it over the Lehigh Valley Railroad. About the only explanation that can probably be made as to why the Coal Co. put such clauses into its leases, is the explanation contained in the leases themselves, and that is, that the lessor was under an obligation to ship via the Railroad and he wanted to see that his lessees lived up to it. Government Exhibit 102 contains a list of those leases. The very first one (2 R., 868) recites that the lessor is under contract to ship via the Lehigh Valley Railroad. Such recitation is evidence why similar clauses are in the other leases. The leases say that the covenant shall only obtain if the tenant gets fair treatment in the way of rates. The leases recited are eleven in number, the first six made by the Lehigh Valley Coal Company, one by the Wyoming Valley Coal Company, one by the New York and Middle Coal Field Railroad and Coal Company, one by the Locust Mountain Coal and Iron Company, and two by the Delano Land Company.

As will be discussed at length hereafter, the statutes of Pennsylvania, for the purpose of developing the coal regions, gave railroads the authority to invest in stock and bonds of coal companies and guarantee the principal and interest of

bonds of coal companies. Was it equitable, or was it inequitable, that a railroad company, after it had made its investment as aforesaid and after it had perhaps built its line, the value of which was then wholly dependent upon the transportation of coal, should receive the transportation of the coal, or should not? And if under the authority of the statutes of Pennsylvania the railroad company had even made a contract in those early days, years and years before the Interstate Commerce Act, that it would help the coal company along by buying its stock and bonds if the coal company would ship its product over the railroad, what was wrong about it, and who was hurt? And it is a question whether even today, if such contracts were made, in pursuance of the lawful authority given by the State of Pennsylvania, there would be any violation of the Interstate Commerce Act if the coal company shipped the coal it produced into some other state. The case of the *Bald Eagle Valley Railroad Company, et al.*, vs. *The Nittany Valley Railroad Company*, 171 Pa., 284, expressly says that such a contract is good, and in that case an injunction was given restraining a diversion of traffic from a railroad entitled to receive the transportation of ore produced by a company to the bonds of which the railroad company had subscribed in consideration for a covenant as to its shipments. Evidence is ample, and will be shown hereafter in detail, that if the railroad companies in the mining regions of Pennsylvania had not subscribed to the stock and bonds of the mining companies, it would have been a far day before they would have been developed, and the State of Pennsylvania would have been far behind its present position in

the industrial world. And it stands to reason that no railroad company would have subscribed to the stock and bonds of a coal company and built its lines to collieries, the existence of which lines became wholly dependent upon the transportation of coal, unless they had expected to receive the haul and had been entitled to make contracts securing the haul of the coal. And the Lehigh Valley Coal Company being under contract, the Delano Company and the Wyoming Company and others certainly being under a moral obligation to ship via the Railroad Company, they put their tenants under a similar obligation, and the effect was to throw that much more coal into the flow of commerce and competition at points along the Lehigh Valley Railroad and elsewhere.

The Government says that the effect of these eleven leases was to prevent the building of other railroads, but Mr. Wilgus testified that the railroad development in the anthracite regions was about as thick as anywhere he knew of, and a glance at Railroad Exhibit 34 (4 R., 2279) will corroborate the statement. Just why any other railroad should be built in that region, therefore, does not seem clear. With eight railroads between the anthracite regions and tidewater, New York, cross each other time and again, and on the other side with every one of them either going direct to Buffalo or having a connection to Buffalo and beyond and crossing each other in that direction, it looks as if there were enough. Even in the old *Reading Case*, 226 U. S., the only reasons appearing as to why anybody wanted any other railroad was because Simpson and Watkins and some others were dissatisfied with the prices at which they were selling their coal and dissatisfied with the

then rates. But the power of the Interstate Commerce Commission as to rates is ample. We know of no community that wants anthracite coal that is not able to get it, and the 65 per cent. contracts about which Simpson and Watkins worried were stricken down by the Supreme Court not because they were severally bad, but because the Court believed them to have been made as the result of a combination between all the carriers.

IV. The G. B. Markle Company's Collieries.

In the year ending June 30, 1913, the G. B. Markle Company produced and shipped over the Lehigh Valley Railroad 1,246,665 tons of coal, which was handled on a commission by the Lehigh Valley Coal Sales Company under a contract which has about four more years to run. The Markle Company operates four collieries—Highland No. 2, Highland No. 5, Jeddo No. 4 and Jeddo No. 7 --in the Lehigh region, and not one of these has a railroad other than the Lehigh Valley within a mile of it, except Highland No. 5—Railroad Exhibit 54 (4 R., 2305). The Jersey Central is about 800 feet from Highland No. 5, but the Drifton Branch which comes to this point has not been in operation between Drifton Junction and Drifton —a distance of about ten miles—for a number of years.

The Government has taken the position that the Jersey Central and Pennsylvania, by the construction of short spurs, could easily reach these collieries. It says that the Markle Company might be an important factor in introducing some real

competition in the production and transportation of anthracite. Just how they reach the conclusion that a railroad connection by the Pennsylvania Railroad and the Jersey Central, if it were practicable, with these collieries would put a factor of competition in the distribution and sale of coal at points along the Lehigh Valley Railroad, is difficult to reason out. If they mean that the Jersey Central and Pennsylvania Railroads might carry to points also reached by the Lehigh Valley, then we do not see what difference that makes, provided the rates of each line are reasonable, which is a matter for the Interstate Commerce Commission; and if they mean that there might be competitive through routes under joint rates to other points on the Lehigh Valley, we will concede that and say again that we do not see what difference it makes in respect of either collieries or dealers already located on the Lehigh Valley, because it again becomes a question of rates and a matter for the Interstate Commerce Commission. If it becomes a question of car supply, that again is a matter regulated on a strictly scientific basis, supervised and controlled by the Interstate Commerce Commission, and worked out in accordance with its promulgated rules and regulations.

But let us look at the matter from another angle. In 1876, for some reason or other, a contract was made between the Lehigh Valley Railroad Company, on the one part, and George B. Markle, William Lilly and Asa Packer, trading under the firm name of G. B. Markle & Company, of the second part (Railroad Exhibit 30—4 R., 2191). Now, Asa Packer, as will be seen hereafter, was the real founder and builder of the Lehigh Valley Rail-

road and, incidentally, of the Lehigh University, and, together with William Lilly, was one of the incorporators of several of its subsidiary companies, and Asa Packer was the President of the Lehigh Valley Railroad Company for a long period of years and until his death (3 R., 1130).

This contract shows that he was a partner with G. B. Markle and W. Lilly, trading under the firm name of G. B. Markle & Company in 1876. That is the Company the name of which was subsequently changed to G. B. Markle Company (R., 496). The interest of Asa Packer was apparently sold to the Lehigh Valley Coal Company, because in 1894 the Company speaks of parting with its interest in the firm (2 R., 926)—which interest amounted to about a third, or, accurately, six-sixteenths (2 R., 1024)—but retaining the sale of the coal. A partner retiring from a firm in which he or his predecessor has been interested for at least eighteen years, and fourteen before the passage of the Sherman Act, ought reasonably, it seems, be allowed to sell the output of that firm on a commission basis.

Mr. John Markle, President of the G. B. Markle Company, was a witness in this case. He testified that he has not "a scratch of a pen" as to any obligation to ship over the Lehigh Valley Railroad. His coal is sold all along the lines of the Lehigh Valley Railroad and also in New England and the middle west, and some shipments as far west as California (3 R., 1594).

V. The existing relationships do not affect "a part" of trade and commerce.

The restraint of trade or the monopolization thereof which is contrary to the Sherman

Act must be that restraint or monopolization which directly, substantially, unduly and unreasonably affects *a part of trade and commerce.*

Government Exhibit 68 (2 R., 820), shows that at one point of distribution alone, to wit, New York Harbor, the tonnage of the Lehigh Valley Coal Sales Company has been but a minor percentage of the vast volume of tonnage distributed from that center, even of the few companies therein mentioned and exclusive of the enormous tonnage which moved over the various railroads to New York Harbor belonging to and sold by companies other than the few mentioned in that exhibit. For example: Railroad Exhibit 5 shows that in the fiscal year ending June 30, 1913, the tonnage of the Lehigh Valley Coal Sales Company to New York Harbor was but 11.94 per cent of the total tonnage shipped to New York Harbor during that period. Moreover, it should also be mentioned that the small sizes of anthracite constitute about 14 per cent. of the shipments and that they are in keen competition at all points with bituminous coal (2 R., 823).

Section 2 of the Sherman Act explicitly uses the word "part". *United States* vs. *Patten,* 226 U. S., 525, says that that *part* must be "all or the dominant portion of a commodity." In other words, the Sherman Act applies to a unit of commerce, and not a part of that unit. It is a part of commerce that must be affected, and not a part of a part. In another form the rule was summarized by counsel for the Government in arguing the *American Tobacco Company Case* and is stated at page 117 of the report of that case in 221 U. S., as follows:

> "Monopoly is the outcome of the practical cessation of effective business competition.

> This word in the Anti-Trust Act has no reference to a grant of special privileges but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing business—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) *acting in concert practicaly acquire power to control prices and smother competition.*"

Now, on the Government's own theory and averments in this case, their so-called "territorial unit" is the thing to be affected, and all the arguments narrow down to that point. As we have seen (4 R., 2304), the Lehigh Valley Railroad Company delivers to local points on its line about three million tons of coal a year. There are carried from the anthracite regions about 69 million tons of coal a year. There are eight competing railroads which carry it, and from the lands tributary to one of them, *i. e.*, the Lehigh Valley Railroad Company, many substantial operators produce over thirteen million tons, and of this amount about nine million is purchased and shipped by the Lehigh Valley Coal Sales Company and over four million by seven of its many competitors. These competitors sell in keen and active competition at every point along the line of the Lehigh Valley Railroad.

Turning to the map, we see numerous points, both east and west, where both the Lehigh Valley Railroad and one or more railroads which compete with it run through the same communities. Therefore, at those points there is the actual competition not only of the eight competitors shipping on the Lehigh Valley Railroad, but of the many competitors shipping on the competing lines of railroads, and having a volume of tonnage amounting to some 56

million tons to turn into the general competition. Again, at each point where one railroad has a track connection with another, the dealers directly located on the Lehigh Valley Railroad have, through a switching arrangement, the power to buy coal from any producer on the line of the connecting railroad. There are now twenty-one points where there are switching rates, and numerous other points where a mileage tariff can be applied, and if the rate therein is too high, the Interstate Commerce Commission has ample power to make it what in its opinion is reasonable.

As to the strictly local or intermediate points, we have seen that the producers located on lines of railroad which connect with the Lehigh Valley have the power through existing joint rates to reach these local or intermediate points along the Lehigh Valley Railroad, and how, if the existing joint rates do not open up sufficient avenues or channels of commerce, the Interstate Commerce Commission has ample power to open others, and has recently decided a case embracing that very subject among other points of inquiry. A glance at the map will show that coming toward the east the Jersey Central parallels the Lehigh Valley all the way to Phillipsburg. At Phillipsburg the Lehigh Valley has a track connection with the Jersey Central, as this Record shows. Therefore, through the channels of commerce which are or may be established, every producer located on the Jersey Central Railroad can reach every point in the State of New Jersey touched by the Lehigh Valley Railroad. That is but one of the open channels of commerce toward the east. Railroad Exhibit 53 (4 R., 2303) shows the numerous points of connection, both east and west, between these various competing lines.

Now, turning to the west and taking but one representative route, the Erie Railroad connects with the Lehigh Valley at Waverly, N. Y., a few miles over the State Line, from which point radiates every branch of the Lehigh Valley northerly and westerly into New York State, and, therefore, every local or intermediate point on the Lehigh Valley Railroad has an open channel of commerce for every producer located on the line of the Erie Railroad in the anthracite mining regions.

And in respect of the Railroad's rates to those local or intermediate points, we have seen how the long and short haul clause of the Interstate Commerce Act puts them on an exact parity with the competitive rates which exist at the intersecting points. Hence it is that, even for the moment disregarding the active competition between the shippers who buy at the mines or produce from the mines located at points on the Lehigh Valley Railroad, the coal delivered to points on the Lehigh Valley Railroad is in effect but 3/69ths of the total tonnage carried by all railroads (4 R., 2308), and the other 66/69ths is either in actual or potential competition.

It may be said that we must look at what is really happening, which is that other railroads are not delivering a very large tonnage to the Lehigh Valley Railroad for transportation to its local points, but that is not the legal test. If "A" manufactures and sells all the wire nails used in New England and east of the Hudson River, and "B" manufactures and sells all the wire nails used west of the Hudson River and, we will say, as far west as the Mississippi, and each stays in his own territory, certainly no power under heaven can make them compete if they don't so choose. If "X", at Boston, wants to buy from "B", he can invite "B"

to share the trade. The channel of commerce is open, and if "B" won't sell to "X" at Boston no law is violated, because the channel of commerce is still open. It is only if "A" and "B" perhaps agree not to invade each other's territory that the first infraction of the Sherman Act may result. But the case in 226 U. S., the old Reading Case, found that as between these eight competing anthracite carriers there was no general agreement, and the only things that the Court found had been done in concert, to wit, the purchase of the Temple Iron Company stock and the making of the 65% contracts since 1900, were stricken down. Therefore, the channel of commerce is open in the anthracite trade, and any dealer at any intermediate point on the Lehigh Valley Railroad in the State of New Jersey or the State of New York has an avenue open to him for transportation at reasonable rates of the coal he may wish to buy from producers whose collieries are located beside other railroads in Pennsylvania, the two most obvious and direct routes for such commerce having been mentioned above.

As to the competition between the producers whose collieries have direct track connection with the Lehigh Valley Railroad in the mining regions, we should also note the testimony of Mr. Stem, the Sales Agent in the east of the Lehigh Valley Coal Sales Company (3 R., 1797, 1807, 1815, 1850, 1853), and of Mr. Hamilton, the Sales Agent in the west of that Company (3 R., 1818 and 1825), to the effect that the volume of the business of the Lehigh Valley Coal Sales Company at all line points is very little larger, if any, than that of these other direct competitors. In other words, of the nine million tons of coal purchased by the Sales

Company, no larger part of it goes into the competition at the line points than is the amount of coal sold by Whitney and Kemmerer, Weston, Dodson and Company, Mill Creek Coal Company, Thorne, Neale and Company and the other selling companies, the activities of which have been referred to above in detail.

VI. The reasonableness of the situation as to coal production considered in itself.

The harmonization which must be made between Sections 1 and 2 of the Sherman Act has been stated by Chief Justice White in the *Standard Oil Case*, 221 U. S., 1, at page 61, as follows:

> "Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it, by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints

of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about are not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the *criteria* to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve."

The lawful authority to hold the stock of the Lehigh Valley Coal Company, Coxe Brothers & Co., Inc., and the New York & Middle Coal Field Railroad & Coal Company has been referred to above and is shown in detail at a later part of this Brief. The small percentage of coal owned or controlled by those companies has been mentioned. All in all, it is, as far as the best engineering estimates can go, about 12.47 per cent., and of the coal which is naturally and conveniently tributary to the Lehigh Valley Railroad Company lines in the mining regions, about 27.86 per cent.—Coal Company Exhibit 8 (4 R., 2654). The estimated acreage of the various other companies in the mining regions the stock of which is owned by other Railroad Companies, has also been shown.

From the standpoint of the public interest, let us see what two Government experts think of that situation considered by itself. Mr. George Otis Smith, Director of the U. S. Geological Survey of the Department of the Interior, testified recently before a committee of the Senate in refer-

ence to Alaska soft coal lands, and a portion of his testimony is given in Railroad Exhibit 88 (4 R., 2396). During the course of his examination he was asked about the anthracite lands in Pennsylvania. First, referring to the matter of coal lands generally, he said that coal mines would not be opened unless the railroad operated to such opening, and that the railroad question is largely a question of coal. "You cannot have railroads under existing conditions without coal and you cannot have coal development without the railroads." If the railroads owned and operated the mines it would

> "mean the development of our coal resources, the operation of our coal fields by large units. I think we might drop that word monopolization. It is not monopolization that is the conserving agent—it is not the monopoly that conserves; it is the large unit that conserves. And I should say that the operation of the coal mines by the large and strong interests which control also the railroads in a given field would be a conserving practice, because it would involve large units. • • • In the interests of economical operation, and it would reduce the actual cost" (4 R., 2397).

Of course, he said that the Government should control the large units, but that the large unit in itself was the thing to be sought.

> "The day is past for small operations in any industry of this country, and if we wish to bring back the old conditions, and which still persist, if we wish to encourage the existence of small operations which mean nothing but wasteful competition, I think we would be working directly against the operation of natural law, and I do not think that natural

law ought to be opposed either by executive order or by legislative enactment."

He read into the Record an address by Mr. Edward W. Parker, also a member of the Geological Survey of the Department of the Interior (4 R., 2404). Mr. Parker said:

"The present situation in the anthracite region is one that has been developed through sheer necessity, if the conservation of the supply of anthracite and the prolongation of the life of the fields in the best interests of the people were to be attained in any other way than through government control, and government control did not seem to be materializing. I believe that even Doctor Raymond will subscribe to the statement that a good part of the history of anthracite mining has been one of profligate waste in the mining, preparation, and use of that precious supply of fuel; and this has only been remedied, none too soon, and could, under the circumstances, only be remedied by the close control and conservative management which have been brought about in recent years. And I might pause here to pay a merited tribute to such men as Doctor Raymond, Eckley B. Coxe, P. W. Sheafer, Franklin B. Gowan, William Griffith and a few others through whose efforts many reforms which lessened the waste of anthracite were effected. They were the pioneers in the battle for conservation, and a monument should be erected to them.

"The securing by the Reading R. R. for its offspring, the Philadelphia & Reading Coal & Iron Co., of the great coal reserves it owns today, was the beginning of a great movement which was foreseen by those in a position to see. The Reading company was temporarily bankrupted through its guarantee of the debt thus incurred, but the possession and control

of those coal lands are indirectly the most valuable assets of the railroad at the present time. More than this, however, in the ultimate economy of things, has been the preservation of thousands of acres of coal lands from reckless spoliation. The way was paved for the safe and sane control of the anthracite industry, albeit by a trust, and a stop was put to the cut-throat competition and extravagant methods which in earlier years had resulted in losses of millions of dollars in money and more than millions of tons of coal.

"Under former conditions in the anthracite regions, when it was not considered necessary to give thought to the morrow, and indeed up to the time when the Anthracite Coal Waste Commission made its report in 1887, it was estimated that for every ton of coal mined and sold 1.5 tons were lost. The greater part of this loss was in the coal left in the grounds as pillars to protect the workings, while millions of tons of small coal or screenings were thrown on the culm banks which now form unsightly mountains in the coal regions. Improved methods of mining and of preparation have of late years reduced the percentage of waste, so that at present the recovery will average about 60 per cent. and the loss about 40 per cent. By the means of washeries usable coal is being saved from the old culm banks, and especially designed furnaces have made it possible to use this fuel in steam plants. It may also be possible in the future to recover a considerable part of the coal from the pillars in the old workings where they have not been hopelessly crushed by the settling of the overlying strata; but this could be done only at enormous expense compared with the present mining cost, and when the burning of anthracite coal shall have become a luxury and permitted only to the wealthy. Even in our day and generation it is only by the strictest economy and skillful management in the opera-

tion of the mines that the price of coal to the consumer can be preserved as at present. The average price of anthracite at the mine ranges from $2.25 to $2.35 per long ton. What are known as "prepared sizes"—lump, broken, furnace, egg, stove, and chestnut—range from $3 to $3.75, and all the profit must be made on these. Pea and smaller sizes are sold at less than the cost of production, some as low as from 40 to 50 cents a ton. A careful study of conditions in the anthracite region will convince the most skeptical that no robbery of the public is now being carried on."

Mr. R. V. Norris, a mining expert, testified in this case, respecting the scientific methods pursued by the defendant Coal Companies, their increasing cost of production, their difficulties and dangers, and the public benefit resulting from the present status of affairs. He is a member of Mining Societies and Institutions of several countries, has taught at Columbia and lectured at Harvard University, and no one is better qualified to attest the public benefits which are flowing from the present grouping of coal mining companies in the anthracite regions (3 R., 1476).

Add this to the competitive situation which governs the rates of transportation, the power of the Interstate Commerce Commission to fix rates which are reasonable, and establish through routes and joint rates, if the present are not sufficient, in spite of the absence of any larger demand than for those presently in effect; the competitive situation which obtains in respect of the sale of coal at the larger markets; the competition of the producers and shippers on the individual railroad; the actual and potential competition existing in respect of the power of the producers and shippers on dif-

ferent lines to reach the dealers at line points on the others, and the findings in the case of the *U. S.* vs. *Reading Company et al.*, in 226 U. S., that there was no general combination or conspiracy, and it is submitted that there is not an element in respect of the production, transportation and sale of anthracite coal which can be said to be against the public interest.

Counsel for the Government have taken many pages of the Record in dealing with matters relative to the course of relations in the past between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company, and therefore, while we do not deem the matters necessarily pertinent to the issue as to whether there is a present restraint of trade or monopolization thereof, or a power to bring about any result contrary to the Sherman Act, nevertheless, in order that there may be no doubt in the mind of the Court as to the propriety, legality and lawful effect of those relations, we shall take them up in detail and open PART TWO of this Brief.

PART TWO.—THE SITUATION PRIOR TO MARCH 1, 1912, DID NOT INVOLVE ANY RESTRAINT OR MONOPOLY OF A PART OF TRADE AND COMMERCE.

I. A study of the origin and history of the relationship between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company and how it fully answers a charge that there was ever any intent to bring about, or that there was brought about, a contract, combination or conspiracy to restrain or monopolize any part of trade and commerce.

A study of the reasons for the relationship between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company and Coxe Brothers & Co., Inc., and the course of conduct which has taken place during that relationship, will show that there has been no combination of the business of a carrier and a shipper; that there has been no conduct prejudicial to independent shippers, or any rebates or preferences given to the coal companies, or any excessive freight rates exacted, or any practices pursued which were generally illegal under both State and Federal laws, as has been alleged by the Government in this case. If all those things had been done, the assets of the Lehigh Valley Railroad Company would not have been sufficient to meet a tenth of the fines and

penalties that would have long since been heaped upon the Railroad Company under the Interstate Commerce and Elkins Acts. There sits in Washington, with tentacles of investigation that permeate the remotest tissues of the great Railroad body of the United States, a relentless avenger of every slightest breach of those Statutes.

1. *The legislative policy of the State of Pennsylvania.*

Anthracite coal, like any other commodity purchased at points far removed from the markets where it is used, has, as the economists call it, a "placement value." Unless carried somewhere for use it is of little value. The development of the anthracite mining industry in Pennsylvania, therefore, became dependent upon the natural development of transportation outlets, and by reason of the nature of the country the continued existence of the carriers was dependent on the anthracite traffic.

Recognizing this mutual dependence of the two businesses the State of Pennsylvania, almost at the inception of the mining industry, adopted the legislative policy of incorporating companies having joint powers of mining and carrying. But few special charters of this character were taken and, therefore, as the necessary capital was not forthcoming for development of the mining regions, in 1868 and again in 1869 a definite and general policy was adopted of permitting carriers to purchase the stocks or purchase or guarantee the bonds of coal mining companies. The Courts have taken judicial notice of that situation. For example, in the case of *United States* vs. *Delaware & Hudson*

Company et al., 164 Fed., 215, Mr. Justice Gray at page 224 said it is:

> "necessary to keep in mind the situation as presented by the defendants, the facts set forth in their individual answers and the relevant industrial conditions which, being matters of common knowledge, may be judicially noticed.
>
> "The general situation is, that for half a century or more, it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and in other states. Two of the defendant corporations, as appears from their answers, were created by the Legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendants companies in coal lands and mines, and in the stock of coal producing companies, and that coal production was enormously increased and its economies promoted, by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada, for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other states and Canada, and of this four-fifths, from

> 70 per cent. to 75 per cent. was produced either directly by the defendant companies or through the agency of their subsidiary coal companies. It also appears from the answers filed, that enormous sums of money have been expended by these defendants, to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

The above language was quoted by the Court in the case on appeal, *U. S.* vs. *D. & H. Co., et al.*, 213 U. S., 366, 402.

A statement has been prepared, contained in Lehigh Valley Railroad Exhibit 87 (R., 2382), which shows in detail the enactments of the State of Pennsylvania which express its legislative policy. That the Constitution of Pennsylvania of 1874 did not alter that policy is fully demonstrated at later place in this Brief.

At page 39 of the Record, Government counsel asked for an admission in respect of the ownership of the capital stock of certain coal companies by certain railroad companies, and pages 390 and 391 show the admission in respect of seven groups. The railroads in these respective groups are referred to in the petition, at page 13, as the "transportation outlets." The authority for the relations between

the members of these respective groups is also set forth in Railroad Exhibit 87, above referred to.

2. *The Beaver Meadow and Hazleton lands.*

The oldest constituent part of the Lehigh Valley Railroad System is the Beaver Meadow Railroad & Coal Company, incorporated in 1830 and merged into the Lehigh Valley Railroad Company in 1864. Railroad Exhibit 7 (R., 2111) contains a section of its charter, which provides that it may hold real estate not to "exceed at any time two hundred acres of coal land, besides what shall be necessary for the railroad hereinafter mentioned, and coal yards and landing places as may be proper for the use of said Company: and provided also, that nothing herein contained shall be so construed as to giving or granting to said Company any banking, manufacturing or trading privileges whatever, or any other privileges beyond what may be necessary to the perfect completion of the said Railroad, and carrying on the business of *mining, transporting and vending coal, and receiving the tolls authorized by this Act*" (R., 2112).

By an Act of March 20, 1849 (R., 2113), the powers of the Beaver Meadow Railroad and Coal Company to build to Easton, Pa., are mentioned, unless a railroad company which in the meantime had been chartered—to wit: The Delaware, Lehigh, Schuylkill and Susquehanna Railroad in 1846, the name of which was changed to Lehigh Valley Railroad Company in 1853, as shown by Exhibit 10 (R., 2122) commenced the construction of its railroad up the valley of the Lehigh River, in which event the railroad of the Beaver Meadow Railroad and Coal Company was only to be extended to a point necessary to meet that of the other Company.

By an Act of April 15, 1857 (R., 2114), the Beaver Meadow Railroad & Coal Company was given authority to purchase lateral railroads leading to coal mines, and to make lateral railroads to connect with other coal mines, but not exceeding ten miles in length.

The Hazleton Coal Company was incorporated in 1836 and its charter rights are shown in Exhibit 8 (R., 2115). Attention is particularly directed to the fact that the Company is explicitly incorporated "for the purpose of mining of coal and for transacting the usual business of companies engaged in the *mining, transporting to market and selling of coal and the other products of coal mines.*"

In 1838 the Laurel Hill Coal Company was authorized to construct a railroad with one or more tracks from their coal mines to the Lehigh River, subject to the same terms and restrictions as were imposed on the Beaver Meadow Railroad and Coal Company, and a year later (R., 2117) the Hazleton Coal Company was given all the privileges and powers granted to the Laurel Hill Coal Company for the construction of a railroad to the Lehigh River. These powers were accepted by the Hazleton Coal Company (R., 1113).

By an Act of 1849 (R., 2118) the Hazleton Coal Company was given authority to construct a double track railroad, and certain ton mile rates were prescribed in respect of the transportation of coal, salt, gypsum, lime, limestone and iron ore, showing very clearly the intention of the State of Pennsylvania that these Companies, incorporated for the joint development of anthracite mines and the transportation of anthracite coal, were also to engage in a general railroad business.

By an Act of 1851 (R., 2119) the Company is

given authority to hold real estate in the City of Philadelphia, in the exercise of which authority the Company bought property on Walnut Street, Philadelphia, which by succession came to the Lehigh Valley Railroad Company and upon which, until 1872, the general offices of the Lehigh Valley Railroad Company in the City of Philadelphia, and in fact its corporate offices were located.

By an Act of 1856, the Hazleton Coal Company was made subject to the general Railroad Law of the State of Pennsylvania known as the Act of 1849. The situation was continued for nine years, when, in 1865, by an Act of March 9 of that year (R., 2120), the name of the Company was changed to Hazleton Railroad Company, and three years later, namely: on May 25, 1868, the Company was merged and consolidated with the Lehigh Valley Railroad Company.

Prior to the merger (namely in 1868—R., 2120), the Company had been given the authority to supply or furnish water to the inhabitants of the Borough of Hazleton subject to the general water law of the State, the Company previously having equipped itself with reservoirs and underground pipes for supplying their "coal works."

Both the Beaver Meadow Company and the Hazleton Company had, prior to their mergers with the Lehigh Valley Railroad Company, been given authority by different Acts to increase their holdings of coal lands for the purpose of mining coal, as set forth in Railroad Exhibit 87 (R., 2386). In connection with the powers of the Hazleton Railroad Company, there should also be noted the interest of A. Pardee & Company therein as early as, if not earlier than, 1867, as shown by Railroad Exhibit 95 (R., 2435).

It might also be mentioned incidentally that a small branch extending out from Wilkes-Barre was built originally by the Franklin Coal Company. It is the branch which connects with the Franklin colliery, which colliery produces about 300,000 tons per year, and the branch is exclusively used for collecting that tonnage. See Railroad Exhibit 54 (R., 2305). The acquisition of the branch is referred to in Railroad Exhibit 28 (R., 2187).

3. *As shown above, one of the plans of the State for the development of the mining regions was the incorporation of companies with joint mining and transporting powers. The second method was to encourage development by authorizing the railroad companies to invest in the stock and bonds of the coal companies.*

The two subsidiary companies referred to above, *i. e.*, the Beaver Meadow Company and the Hazleton Company, owned coal lands, but their development was delegated to others by leasing the properties. Between 1830 and 1868 virtually all the main mileage of the Lehigh Valley Railroad system in the State of Pennsylvania had been projected and built, but, as will be seen, the project was primarily for the purpose of transporting anthracite, and could have been built for no other purpose, because its mileage in the coal regions was altogether dependent upon anthracite and its extension down the valley of the Lehigh River and north along the Susquehanna River were only justified on account of the anthracite traffic.

The anthracite coal regions embrace something less than 500, or accurately about 484, square miles. It is a mountainous country, unfertile and barren for the most part of even trees or shrubs. The

location of the different coal fields in these regions is described by Mr. Norris (R., 1480) and by Mr. Parker (R., 2080). Mr. Parker says that the first anthracite mined in the United States was in the Wyoming region in the last decade of the eighteenth century. In 1807 the first shipment of 55 tons was made to Columbia and 22 tons were in 1814 shipped from Carbondale to Philadelphia. The first shipment from the Lehigh region was in 1820, and systematic production may be said to have had its beginning in that year when 365 tons were sent out of the region. See Railroad Exhibit 4 (R., 2081). Mr. Parker is the statistician of the U. S. Geological Survey, Department of the Interior, and has written many pamphlets relative to the production of anthracite coal, extracts from one of which pamphlets is Railroad Exhibit 4 (R., 2077). His investigation showed him that some incidental mining took place before 1800, but from his studies it is clear that the Lehigh region was opened in 1820.

When, therefore, it was discovered that this unattractive and uninviting region contained a mineral that was capable of use as a fuel, a primary consideration in respect of its use was that of its transportation to markets for consumption. Several methods were tried before railroad development began, primarily in attempts to make the Lehigh River navigable, but the uncertainty existing in those early days—that is, in the first quarter of the nineteenth century—as to the use and value of anthracite caused those having capital to spend upon transportation outlets to hesitate and seriously reflect on whether their investment would show any beneficial results. In the ground or even brought to the surface the coal only had a place-

ment value. It was absolutely useless in those regions and Philadelphia was the nearest community of any size to which it could be transported and experiments made as to its commercial value.

In 1818 the Pennsylvania Legislature granted to Josiah White, G. F. A. Hauto and Erskine Hazard, Philadelphians who had purchased tracts of coal lands, certain rights to improve the navigation of the Lehigh River. See Railroad Exhibit 82 (R., 2382). Those gentlemen transferred these rights to an association called the Lehigh Navigation Company, and they conveyed their coal lands to an association called the Lehigh Coal Company, and these two associations in turn amalgamated themselves into a single association called the Lehigh Navigation & Coal Company, which thereafter had the right under the statutes of Pennsylvania to both mine and transport anthracite coal.

In 1822 the Pennsylvania Legislature, reciting that it was *the manifest interest of the Commonwealth to promote by all proper means an object so important to the State*, transferred to a corporation known as the Lehigh Coal & Navigation Company the rights of the earlier association, and authorized it at any time within a year from the passage of the Act to commence a slack water navigation of the River Lehigh. This was the beginning of the so-called Lehigh Canal, the first avenue of transportation from the regions. Various methods were undertaken for bringing coal to the canal, one of the earliest being the building of the crude railroad of the Beaver Meadow Railroad & Coal Company. That was within a few years of the time of the invention of the steam locomotive, but before its practicability had been demonstrated.

This railroad came to the top of the mountain

near the point now called Penn Haven Junction, and from that point the cars were let down an inclined-plane and the coal then transferred to the small boats which were towed down the channel of the Lehigh River. From Weatherly, a point near Penn Haven Junction, to the top of the mountain at Penn Haven Junction the railway consisted of a series of inclined-planes. Just when the Beaver Meadow Railroad began to use steam power for hauling coal from the mines to the inclined-planes is not clear, but the records of the Company show that the first method of transportation was that of having horses or mules pull the cars on the strips of iron which had been fastened to wooden planks laid with the rails. Except for the few supplies needed for the miners and the mines, there was nothing to carry to the regions, and with the exception of a few coarse commodities such as lumber and slate, there was nothing to carry from the regions outside of anthracite.

From an economic standpoint, therefore, it is obvious that those who would expend their capital in experimental railroads from this region had to be assured of the transportation of the anthracite, and, as the records of the State of Pennsylvania abundantly prove, it was not only to the interests of the State, but was a necessity that the mining of the coal and the transportation thereof should be a joint affair.

Dr. Roberts in his book called "The Anthracite Coal Industry" (Macmillan & Co., 1901), says:

> "The most difficult problem which confronted the pioneer operators in anthracite mining was that of transportation. To mine coal was comparatively easy, but to get the product to market was a problem which taxed the energies of these men beyond what we can nowadays

> imagine. Much money and time and labor were lost before it was successfully solved, and many of the men who conducted these experiments reaped nothing from their efforts but financial ruin and disappointment. To induce capitalists to build these railroads and canals, there must have been a prospect of great and enduring profits. Especially must this have been the case in the early years of mining, when men were uncertain as to the foundation upon which they built."

The unquestionable public benefit which resulted from such joint development has been clearly recognized by the Supreme Court of the United States, as it must be recognized by anyone who would consider the matter impartially. In the *Commodities Clause Case*, 213 U. S., 366, the Supreme Court, in specifying the several grave constitutional questions which it avoided decision of by giving the Commodities Clause the construction announced in that decision, said that one of the questions necessarily involved was:

> "*a.* Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, *and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible?*"

With this in mind let us trace the development of the Lehigh Valley Railroad System. We will take up the steps in the development of the Company chronologically:

1830: In this year the first constituent company, the Beaver Meadow Railroad & Coal Co., in the Lehigh Valley Railroad System was incorporated, having authority to construct a line from the vicinity of Mauch Chunk to a point which is now the village of Beaver Meadow and to several adjoining mines in Carbon County (R., 1112). See Railroad Exhibit 7 (R., 1113, 2111). The construction of the line, however, was not undertaken until several years later. As noted above, the Company was given authority to carry "on the business of mining, transporting and vending coal and receiving the tolls authorized by this Act" (R., 2112).

1836: By this year the line of the Beaver Meadow Railroad & Coal Company was completed and the Hazleton Coal Company was incorporated under an Act of March 18, 1836. Railroad Exhibit 8 (R., 1114, 2115). The charter says "for the purpose of mining of coal and for transacting the usual business of companies engaged in the mining, transporting to market and selling of coal and the other products of coal mines."

1838: In this year the Laurel Hill Coal Company was authorized to construct a railroad with one or more tracks from their coal lands or the Hazleton Railroad to the Lehigh River, subject to the same terms and conditions provided in the Act to incorporate the Beaver Meadow Railroad & Coal Company. Railroad Exhibit 8 (R., 2116).

1839: A supplement was passed to the charter of the Hazleton Coal Company on March 8, 1839—Railroad Exhibit 8 (R., 2117)—granting to the Hazleton Coal Company authority to exercise all the privileges and powers granted to the Laurel Hill Coal Company.

1846: In this year the Company which subse-

quently became known as the Lehigh Valley Railroad Company was chartered under the Act of April 21, 1846, and then known as the Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company—Railroad Exhibit 9 (R., 2121). The Company was authorized to build a line along the valley of the Lehigh River from Mauch Chunk to Easton, thereby affording a better method of transportation to the Delaware River, or, in other words, avoiding the slow canal boat transportation down the Lehigh Canal. The transportation of anthracite was the primary consideration in the building of that line. The charter of the Company provides for the connection of lateral railroads "for the purpose of transporting their coal or produce on such railroad" (R., 2121), and it was further provided that "Any person or persons owning such coal or produce shall have the privilege of transporting the same on said railroad in their own cars subject to the rules and regulations of said Company".

1849: In this year the charter of the Beaver Meadow Railroad & Coal Company was amended and a privilege given to extend the road to Easton—this is, down the valley of the Lehigh River—unless "the Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company shall commence their railroad on the valley of the Lehigh and complete the same within the time provided in their Act of Incorporation or any supplement that may be passed thereto", in which event "the privilege hereby extended to the Beaver Meadow Railroad & Coal Company shall not authorize the extension of their road further down the Lehigh than shall be necessary to connect with the Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company's road". See Railroad Exhibit 7 (R., 2113).

The charter of the Hazleton Coal Company was also amended by an Act of April 5, 1849, giving the Hazleton Coal Company the authority to construct a double track railroad—Railroad Exhibit 8 (R., 2118).

1853: In this year the construction of the Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company through the valley of the Lehigh River was begun, and by an Act of January 7, 1853—Railroad Exhibit 10 (R., 2122)—the name of the Company was changed to Lehigh Valley Railroad Company. Within the next two years the line of the Company had been completed along the valley of the Lehigh River between Easton and Mauch Chunk, and the railroad of the Beaver Meadow Railroad & Coal Company had been built around the mountain at Waverly and extended down to the Lehigh River and thence from Penn Haven down to Mauch Chunk to connect with the Lehigh Valley Railroad Company. The construction of these two lines was primarily, and in fact at that time solely, for the transportation of anthracite, and as connecting outlets it had at Easton the Central Railroad of New Jersey, the Belvidere, Delaware Railroad Company (now a part of the Pennsylvania Railroad System), the Morris & Essex Railroad (now a part of the Delaware, Lackawanna & Western Railroad System), the Delaware Division Canal and the Morris Canal & Banking Company (R., 1118). Before reaching Easton it connected with the North Pennsylvania Railroad Company at South Bethlehem, now a part of the Reading System (R., 1118).

1854: In this year, under the Act of March 23, 1854—Railroad Exhibit 12 (R., 2123)—there was incorporated the Jeddo & Carbon County Railroad

Company, among the incorporators being Ario Pardee, the founder of the firm of A. Pardee & Company which is mentioned at numerous points in the records of this case; William Lilly, William W. Longstreth, who for many years was President of the Lehigh Valley Railroad Company; Algernon S. Roberts, J. Gillingham Fell, who at that time was President of the Lehigh Valley Railroad Company; and Edward Roberts, all of Philadelphia except Ario Pardee. This railroad was incorporated for the purpose of building a line near Black Creek in Luzerne County to accommodate certain adjacent coal lands and to connect with the Hazleton Railroad and the Beaver Meadow Railroad. It was given the privilege of building branches not more than five miles long "to accommodate the owners of coal lands".

1856: This year was one of considerable importance in the history of the Lehigh Valley Railroad System. The Lehigh Valley Railroad had been, during the previous year, opened to Easton (R., 1118), and under an Act of March 8, 1856—Railroad Exhibit 11 (R., 2122)—Lehigh Valley Railroad Company was authorized to connect with the line of the Beaver Meadow Railroad and Coal Company, and a connection was accordingly perfected (R., 1115). The Hazleton Coal Company, the railroad of which already connected with the Beaver Meadow line, by an Act of January 12, 1856 (R., 2119) was given general powers as a railroad company and made subject to the General Railroad Law of the State.

By an Act of February 12, 1856, the name of the Jeddo & Carbon County Railroad Company was changed to "The Lehigh & Luzerne Railroad Company" and its line then extended from a connec-

tion with the line of the Hazleton Coal Company at Lumber Yard northward through Council Ridge by means of a tunnel in what was known and is known as the Black Creek Valley (R., 1115).

Lying immediately southwest of the region reached by these small gathering lines—to wit: the Beaver Meadow, Hazleton and Lehigh & Luzerne lines—was the so-called Mahanoy and Shenandoah regions, which promised to produce a considerable tonnage and which awaited development. The annual report of the Board of Directors of the Lehigh Valley Railroad Company to its stockholders for the previous year had said (R., 2135):

> "The distance from these coal deposits is less to New York via Lehigh Valley and the Little Schuylkill Railroads and the grades and other natural obstacles less than by any other route. The only outlet at present for 500,000 tons of coal which they are prepared to mine in the Ashland district is the Mine Hill road, whose acknowledged capacity is one million tons per annum but whose active business this year with great effort reached 125,000 tons. They surmount the Broad Mountain (which at Ashland is the southern boundary of the coal basin) with two planes whose aggregate length is 9,000 ft. and elevation 700 ft."

By the same Act which authorized the connection with the Beaver Meadow line, the Lehigh Valley Railroad was authorized to build "to some point in Schuylkill County with the right to connect with the railroad of the Little Schuylkill Navigation, Railroad & Coal Company at or near Tamaqua" (R., 2122).

1857: In this year, by an Act of April 15, 1857

(R., 2114) the Beaver Meadow Railroad & Coal Company was authorized "to purchase the lateral railroads in the meadow connecting with the Beaver Meadow Railroad leading to coal mines, and to make lateral railroads to other coal mines as may be required, provided that no such lateral shall exceed ten miles in length." The Company was also made subject to the General Railroad Law of the State.

By an Act of April 8, 1857, the name of the Lehigh & Luzerne Railroad Company was changed to Lehigh, Luzerne Railroad Company (R., 2125).

By an Act of April 25, 1857—Railroad Exhibit 13, (R., 2126)—several Philadelphians and other residents of the State of Pennsylvania, among whom were Asa Packer, who shortly after became President of the Lehigh Valley Railroad Company, Robert H. Sayre, who at that time was General Superintendent of the Lehigh Valley Railroad Company, and E. A. Packer, who was then one of the Board of Managers of the Lehigh Valley Railroad Company, were authorized to incorporate the Quakake Railroad Company, with power to construct a railroad beginning at a point on the Beaver Meadow Railroad and running westwardly up the Quakake Valley—Railroad Exhibit 13 (R., 2126)—connecting with the Catawissa Railroad (R., 1116). Section 4 of this Act provided that it should be "lawful for any railroad company with whose road the said Quakake Railroad Company may or shall connect to subscribe to the capital stock of said Company."

In this year the Company took the first step toward building a line into the Wyoming region. Under an Act of May 4, 1857, several of those interested in the Lehigh Valley Railroad, including

David Thomas, J. G. Fell and Asa Packer (R., 2440), incorporated the Penn Haven & White Haven Railroad Company "with power to construct a railroad from a point on the Beaver Meadow Railroad at or near Penn Haven to the Lehigh & Luzerne Railroad at or near White Haven in Luzerne County, with the authority to connect the same with any other adjacent railroads in the counties of Carbon or Luzerne"—Railroad Exhibit 14 (R., 2127).

1858: In this year, in an Act of April 16, 1858 (R., 2125), it was provided that "in order to finish the railroad and tunnel of the Lehigh, Luzerne Railroad Company now in the process of construction, it shall be lawful for railroad, coal and navigation companies connecting therewith or forming continuous lines of transportation between the coal lands of Luzerne and Carbon Counties and the City of Philadelphia or the Delaware Division of the said canal, to subscribe to or invest in the stock and bonds of said Lehigh, Luzerne Railroad Company, or any railroad that may hereafter be constructed between White Haven in Luzerne County and Penn Haven in Carbon County."

1859: The Report of the Company for this year states (R., 2136):

> "The chief business of the Road is the transportation of Anthracite Coal; 74½ per cent. of the entire receipts being derived from that source. *The relation of the Lehigh Valley Road, therefore, to this great interest, is that which mainly engages the attention of its Stockholders.* We do not mean to disregard the ordinary freight and passenger traffic; but while giving those departments all reasonable encouragement, the general arrangement and equipment of the works has reference to the heavy transportation of coal and

iron. * * * The remarkable position of the Lehigh Valley, in reference to the three great coal fields, with the New York and Eastern markets, is claiming the attention of all parties interested.

"There is no question that the best outlet for a large portion of the Wyoming Valley is through Solomon's Gap, and thence to the Lehigh. Fifteen miles of railroad from Penn Haven to White Haven will give uninterrupted communication by rail from both Philadelphia and New York, thus giving an impetus to the trade heretofore unfelt.

"Parties feeling a deep interest in that work have already taken steps towards its construction; thus placing its early completion as a probable result.

"The Lehigh Valley Railroad will be benefitted throughout its entire length by the filling up of this link.

"The Lehigh Luzerne Railroad, connecting the Hazleton Road with the Black Creek Valley, was finished during the year, by which a large and valuable field of superior coal was opened to the market.

"The feelings of the people of Schuylkill County, in regard to the value of the Lehigh Valley as an outlet, is evidenced by their earnest efforts to procure the completion of the East Mahanoy, Tamaqua and Lehighton, and Auburn and Allentown Railroads; all of which connect with the Lehigh Valley Railroad, and by it give to their respective regions the most direct route to New York.

"The Delaware and Raritan Canal Company are now engaged in the erection of extensive facilities at Amboy for the transhipment of coal, which, when completed, will create additional inducement for trade to seek this direction to market.

"The Central Railroad of New Jersey has increased its shipping capacity at Elizabethport to an extent that will meet the full re-

quirements of the present trade in that direction.

"The coal trade, after several seasons of depression, is now experiencing the invigorating effects of a healthy demand, and we do not entertain a doubt that as much trade will be offered to us as our equipments will accommodate."

The Penn Haven & White Haven Railroad not having as yet been constructed, as noticed from the above report, authority was given by an Act of April 11, 1859 (R., 2127), to any railroad, navigation or coal company "to subscribe to or purchase the stock and bonds of said company."

1860: By an Act of April 2, 1860, the Penn Haven & White Haven Railroad Company was given authority to connect with the Lehigh & Susquehanna Railroad at any point, and also authorized to connect "with any adjacent railroad and, for the purpose of completing the said communication, the said company shall have authority to purchase any such railroad or any part thereof."

The construction of the Lehigh Valley Railroad Company for the purpose of developing the coal fields and of affording an outlet for anthracite to the eastern markets is again emphasized by the annual report of the Company for the year 1860, where it was said (R., 2138):

"Two routes have been examined for connecting the great Mahanoy coal field with our road, thence to Trenton and New York by the Belvidere, Delaware and Central Railroads. The first by way of Mahoning Valley to Tamaqua, thence by Little Schuylkill and East Mahanoy Railroad, requiring 17 miles of new road, at a cost of say $600,000. The second is by way of Beaver Meadow and Quakake Railroads, thence into the eastern end of Mahanoy

Valley, requiring four or five miles of new road at a cost of say $75,000. The first named route will give us a good connection with the Schuylkill Valley and with the Sunbury and Erie via East Mahanoy and Mt. Carmel Railroads to Sunbury. The completion of the several links spoken of forming the connection between the rich valleys of the Schuylkill and Susquehanna and the cities of Philadelphia and New York will have the effect of placing the Lehigh Valley Railroad foremost in the great carrying lines of the country.

"Our local coal trade has increased handsomely during the year just passed, and an early adjustment of the political and financial difficulties of the country will enable me at the close of another year to record a still greater increase. There are now four first class blast furnaces and two rolling mills in the course of erection, which will consume about 100,000 tons of coal annually, all of which, together with portions of the ore, limestone, etc., and the product of the furnaces, may be secured to our road."

1861. In this year, for the purpose of developing the Mahanoy and Shenandoah Basins, an extension of the Quakake Railroad Company was proposed, and the report of the Company (R., 2138-9) says:

"The decrease in coal receipts is due to lower rates prevailing most of the season, and to a larger portion of the tonnage being used on the line of the road, and therefore transported shorter distances.

"Our business relations with the several connecting roads has been harmonious and pleasant. A location has been made for the extension of the Quakake Railroad into the Mahanoy and Shenandoah coal basins. It is proposed to build ten miles from the junction, six of which will be over coal. It can be completed at a cost of say $150,000. Measures are being taken

that will secure the building of it at an early date. It will, I think, add largely to our coal tonnage. A charter has been secured and location made for a railroad from Mauch Chunk to the Mahanoy tunnel and North Mahanoy basin via Nesquehoning Valley. It is intended to be built by parties owning the canal between Mauch Chunk and tidewater, but a connection with our road at Mauch Chunk will secure to it the tonnage during the winter season at least.

"The coal from Mahanoy Valley via the tunnel destined for New York water, can only be secured during the entire season, by our building the Mahoning branch. This, I believe, the true interests of the Company demand, and should be done speedily."

In pursuance of its policy to facilitate the development of the coal regions and particularly the financing of the improvements of the existing lines, a policy which became all the more necessary of adoption no doubt on account of the outbreak of the war and the depression of trade consequentially arising, the legislature of the State of Pennsylvania passed in 1861 the first general act in reference to the merging of railroad companies. This was the Act of May 16, 1861—Railroad Exhibit 20 (R., 2166).

1862. By an order of the Supreme Court of the State of Pennsylvania the Quakake Railroad Company was sold and reorganized by the purchasers as the Lehigh & Mahanoy Railroad Company (R., 1117); Railroad Exhibit 16 (R., 2132). The work of extending the road into the Mahanoy coal basin had progressed and the Company reports that "it is expected to open the road as far as Mahanoy City in the spring, when we may expect an addition to our coal tonnage from that region" (R., 2139).

By an Act of March 8, 1862 (R., 2120), the Hazleton Coal Company, which had constructed a reservoir and laid iron pipes for the purpose of supplying its "coal works", was given authority to furnish water to the inhabitants of the Borough of Hazleton, subject to the General Water Law of the State.

1863. The construction of furnaces and rolling mills along the line of the road was noted by the Company as increasing the amount of coal used along the line of the road about 49 per cent. The report for 1863 says: "The multiplication of manufacturing establishments in our valley not only increases the consumption of coal, but adds largely to the other branches of our business, as is shown by our increased receipts from passengers and freight" (R., 2140).

This same year the Company took up again the subject of the projection of its line into the Wyoming region by building on a route leading over Wilkes-Barre Mountain, then down into the valley by inclined planes. The report of the Company says, in this connection, "The coal designed to be reached has been almost entirely undeveloped and may probably remain so for some time, *unless the road in contemplation is built.* When done it will increase the amount of tonage from the Wyoming Valley via the Lehigh Road, and should, therefore, be looked upon favorably by the various companies composing the lines to market" (R., 2140).

During the year the Lehigh & Mahanoy was formally opened to Mahanoy City and about 9,000 tons of coal passed over it to the Lehigh Valley Railroad. Most significant in respect of the object of the Company to establish a railroad system for developing the coal regions and transporting the

products thereof, is the statement in the annual report for this year, as follows (R., 2141):

> "The Lehigh and Mahanoy Railroad was formally opened to Mahanoy City on the first of September, since which time 9,046 tons of coal passed over it to the Lehigh Valley Railroad; about equal to the tonnage of our road during the corresponding months of 1855. It is hoped that the increase from Mahanoy in the coming eight years may keep pace with that of the Lehigh Valley during the past eight. In November its extension to Centralia was put under contract, making a main line from Catawissa Junction of 20 miles, with three branches of about 2½ miles each; all of which but about 4 miles is within the coal measures. There remain about 4 miles to build in addition to that now being graded to reach Mount Carmel, where it will connect with the Mount Carmel and Sunbury Railroad, thus forming a continuous rail communication between the Lehigh at Penn Haven and the Susquehanna at Sunbury. Its completion cannot fail to bring a very large tonnage to the Lehigh Valley and its southern and eastern connections.
>
> "The Lehigh Coal and Navigation Company are building a railroad from their chutes to connect with our road at the iron bridge, one mile below Mauch Chunk, with a view of shipping coal from their mines during the close of navigation."

1864. Under the authority of the merger act above mentioned, *i. e.*, the Act of 1861, two important lines were this year merged with the Lehigh Valley Railroad Company by their respective stockholders, to wit: the Beaver Meadow Railroad & Coal Company on July 8th, and the Penn Haven and White Haven Railroad Company on August 5th—Railroad Exhibit 16 (R., 2132) and Railroad

Exhibit 18 (R., 2141). The line of the Beaver Meadow Railroad Company at this time was about 24 miles (R., 2142), and in respect of its merger, the report of the Lehigh Valley Railroad Company for that year (R., 2142) says:

> "By the union of the two companies in one corporation we become owners of a considerable body of coal lands near Beaver Meadow Village, which formerly produced large quantities of the best anthracite coal; we also became thereby legally possessed of all the rights and privileges and franchises theretofore vested in the Company. The Beaver Meadow Company, though authorized by charter to mine and sell coal, has long since ceased to exercise the right to do so, and this Company sees no reason to change that policy."

The coal lands therein referred to consisted of 1,063 acres near the village of Beaver Meadow, 708 of which contained coal and 355 of which were outside the coal measures (R., 1127). The reason the Beaver Meadow Company had ceased to mine and sell coal was because it had leased its mines in 1850 to outside parties for development. In the succeeding year these lands were leased to Jonah Reese and others—Railroad Exhibit 98 (R., 2443), —and later to the Cross Creek Coal Company, the successor of which was Coxe Bros. & Co., Inc., one of the defendants in this case,—(R., 1136 and 1147; also Railroad Exhibit 97, R., 2441). It is clear, therefore, that at that time the transportation of coal was the sole consideration of the managers of the Lehigh Valley Railroad Company.

In respect of these mergers the report of the Railroad Company for the year 1864 (R., 2142) goes on to say:

> "The three separate Railroad Companies became one corporation, under the corporate

name of the Lehigh Valley Railroad Company. The railroads thus incorporated extended from the east bank of the Delaware River at Wilkes-Barre along the valley of the Lehigh River from its mouth to White Haven, a distance of 71 miles, main stem, and the Beaver Meadow Branch from its junction with the main road below Penn Haven to the Collieries, 17 miles, making 88 miles of railroad nearly all double track with extensive sidings and turnouts. At Penn Haven we also connect with the Hazleton Railroad. That road extends into the Hazleton and Black Creek coal fields. At White Haven we connect with the railroad to Wilkesbarre, from which we receive, beside the ordinary freight and passenger traffic, a considerable amount of coal and lumber, with a prospect of a very large increase, this being the shortest and best railroad route from the Wyoming Valley to Philadelphia or New York.

"Thirteen miles above Mauch Chunk the Lehigh and Mahanoy Railroad connects with our Branch Road to Beaver Meadow, and extends from thence westwardly into the great Mahanoy coal field, and is already opened some 26 miles, furnishing us with considerable coal tonnage, and as it is being extended further into the coal basins of that region, promises to be one of our most valuable feeders. By our own branches and the several railroads connecting with ours, we reach the coal in the Mahanoy, Beaver Meadow, Hazleton, Black Creek and Wyoming coal fields, from all of which we receive a large coal tonnage. Our extension to White Haven has also opened an extensive trade in lumber, and all of the extensions alluded to tend to swell our miscellaneous freight and passenger business, so that since these avenues have been opened our receipts have greatly increased over the corresponding months of the previous year."

In respect of reaching the Shenandoah Valley the report for that year says (R., 2143):

> "The Lehigh and Mahanoy Railroad has been extended westward to Shenandoah, and the graduation and masonry between there and Centreville is well advanced, the location thence to Mount Carmel has been made; it is expected that during the coming summer the connection will be made with the Sunbury and Shamokin Valley Railroad, thus forming a favorable connection with the Philadelphia and Erie Railroad, and opening an immense coal territory that must eventually pour a very large tonnage down the Lehigh Valley; the passenger and merchandise freight traffic will grow with the coal tonnage, thus adding largely to these rapidly increasing branches of the business."

1865. An extension of the Company's own line directly into the Wyoming Valley now became important and stockholders of the Company were called upon to authorize an increase in the capital stock to an amount equal to the cost of projecting the line into that region and building branches to coal mines (R., 2145 and 2146).

In this year the name of the Hazleton Coal Company was, by an Act of March 9, 1865, changed to Hazleton Railroad Company (R., 2120), and the first company which subsequently provided an outlet for traffic north from the Wyoming region via the Lehigh Valley Railroad system was incorporated, known as the Pennsylvania & New York Canal & Railroad Company, organized March 20, 1865—Railroad Exhibit 16 (R., 2132).

There was also passed in this year an act permitting railroad corporations of the State to merge and consolidate with railroad corporations of other States for the purpose of forming con-

tinuous lines of railroad—Railroad Exhibit 21 (R., 2168).

The Lehigh & Mahanoy Railroad has been extended and branches built to various collieries on their line, and it was proposed that this line, in connection with the Pennsylvania system and the Lehigh Valley, should form a link in the "shortest and best railroad route from Lake Erie to New York—the Lehigh & Mahanoy forming 40 and the Lehigh Valley 59 miles of that road" (R., 2145). The Lehigh Valley Company at that time owned $340,000 par value of the stock of the Lehigh & Mahanoy Company, upon which it was receiving 6 per cent. dividends.

The different outlets which the Lehigh Valley Railroad Company had to the east and with which it connected at the Delaware River, have been mentioned and "the beneficial effects of an additional avenue to tide will be felt", says the report for this year, on account of the expected completion of the Morris & Essex Railroad, now part of the Delaware, Lackawanna & Western Railroad system. The same report mentions an increase in tonnage delivered to the Morris Canal for transportation across New Jersey (R., 2146).

1866: The report of the Company for this year mentions the fact that the charges on coal transportation have been considerably reduced in spite of the fact that the cost of conducting the business had remained about the same as last year (R., 2146), and, also, it dwells at length upon the necessity of branching out to the north. In the previous year mention has been made of the incorporation of the Pennsylvania & New York Canal & Railroad Company, and the report of this year sets forth the intention of the Lehigh Valley to

aid in the construction of that Company connecting with the Lehigh Valley near Wilkes-Barre and running along the banks of the Susquehanna River and the old North Branch Canal to the New York State line (R., 2146). This was done by raising the additional capital from the then stockholders of the Lehigh Valley Railroad Company. The transportation of coal was the sole consideration involved, and the report of the Company says (R., 2147):

> "When this road is completed, the Lehigh Valley Railroad will be in a position to carry coal to Northern as well as Southern markets, on as favorable terms as any other route. The New York and Erie Railroad Company proposes to lay a third rail, narrow gauge, from our junction near Waverly to Owego, from which point a railroad is under construction to Sodus Bay (now called Fair Haven), the best harbor on Lake Ontario. Other railroad routes are projected to connect with us, that will offer facilities to reach important points from Albany in the east to Buffalo in the west. Though the Coal trade is the prominent object in the undertaking, there is no doubt that the general Freight and Passenger business would alone justify the building of the road. In fact, it is deemed the best unoccupied railroad route in the State of Pennsylvania."

In this same year, June 20th, the Lehigh & Mahanoy Railroad, under the authority of the acts heretofore mentioned, was merged into the Lehigh Valley Railroad Company—Exhibit 16 (R., 2132 and 1117).

1867: It will be seen from the above that the Lehigh Valley Railroad Company up to this time had been constructed and developed and its small

constituent lines merged solely for the purpose of affording outlets for anthracite coal, and that by no means of any kind did it have an interest in any coal lands, except the lessor's interest in the lands acquired by the merger of the Beaver Meadow Railroad & Coal Company, and, as has been shown, those lands had long been leased to others for mining development. However, other companies had secured from the State of Pennsylvania, under the first method of development mentioned, charters giving the right both to mine, transport and vend coal, and under those charters had exercised their powers and grown to important size. As shown by Exhibit 27, the two railroads of magnitude which had such powers were the Delaware, Lackawanna & Western and the Delaware & Hudson. It is to the interest of any railroad to protect, as far as its rate relations will enable it to do so, the industries on its line. That is sound railroad policy and is well recognized as such by the State and Federal Commissions. It became, therefore, necessary for the Lehigh Valley Railroad, as far as it consistently could, to adjust its transportation rates to enable the shippers located on its lines to sell in the common markets reached by the coal of the Lackawanna and the Delaware & Hudson. The report of the Lehigh Valley for the year 1867 (R., 2147) has to say in this connection:

> "The charges for carrying coal, during the year, were twenty per cent. less than in the previous year. Notwithstanding the reduction, the increased tonnage and mileage have brought up the receipts on coal tonnage to within $244,583.48 of the previous year. The necessity for this reduction did not result from competition in our immediate region, but from the reduced price coal sold for in

> New York by the Companies in the Wilkes-Barre and Lackawanna regions, who combine the privileges of mining and carrying coal to New York, and who sold at public auction large quantities of coal in that market, at prices that obliged us to offer to our customers very low rates of freight, unless we had allowed them to be excluded to a great extent from that the largest market for anthracite coal in the country."

In this year also there came to the minds of the management of the Railroad Company the first notion, at least so far as any expression thereof is concerned, that it was advisable for the Railroad Company to protect the financial soundness of its lines of railroad by assuring themselves by lawful means of the necessary tonnage to enable those lines to continue to thrive. Mr. W. J. Wilgus, for many years a railroad officer, holding for a long term the position of Vice-President of the New York Central & Hudson River Railroad Company, and at present a consulting engineer of wide experience and high standing, testified that from his study of the Company the building up of the system would not have been justified other than for the transportation of anthracite coal (R., 1186), and that this study of the books and records of the Company constantly reflected the expansion of the railroad system as having been made for that purpose. At no point the Company reached was there a sufficient amount of other tonnage to afford earnings large enough to justify the building of the lines (R., 1186). The protection of the latest line built initiated the thought in respect of the assurance of tonnage, and, therefore, the Board of Directors, in

its report for the year 1867 to the stockholders, makes this significant remark (R., 2148):

> "In view of the large and rapidly increasing northern market, the ample means being provided for distribution of coal therein, the necessity for tonnage for our road, and of the manifest tendency of the active mining and transporting companies, now operating in Wyoming to absorb and control large bodies of the most available coal territory, for future use, and the product of mines now opened to swell their present tonnage, it becomes a question for very serious consideration, *whether such precautionary measures should not be adopted as will secure, beyond a doubt, ample tonnage for our northern improvement.*"

1868: It has been seen that since 1856 there had been no material development of the trackage of the Company with the exception of the projection of a line north from the Wyoming region and with the exception of the few miles added to the gathering roads, and for several years the conditions continued. To facilitate financing and economic operation, several roads had been merged, and this year another connecting railroad was merged, viz. the Hazleton Railroad Company, on May 25, 1868 (R., 1117 and Railroad Exhibit 16, R., 2132); also the Lehigh, Luzerne Railroad Company, on June 16th (Railroad Exhibit 16, R., 2132). It has been mentioned above that the former of these companies, the Hazleton Railroad Company, first called the Hazleton Coal Company, had the corporate right of mining, transporting and selling coal. In connection with these mergers the report of the Railroad Company for the year 1868 (R., 1133) says:

> "On June 1st, 1868, by the merger of the stock of the Hazleton Railroad Company and

soon thereafter by the similar merger of the stock of the Lehigh, Luzerne Railroad Company, this company came into possession of said road with all their rights, franchises and property; these two roads having been operated by A. Pardee & Company, lessees. We subsequently purchased from them the rolling stock then in use upon said roads. By these two mergers and by purchase of rolling stock and other property from the lessee there inured to this company all the tracks of those two roads and tracks under the breakers as follows: Single tracks, 30.05 miles; double tracks, 7.42 miles; sidings, 19.71 miles; making a total length of tracks of 65.40 miles. Also about 1,800 acres of valuable coal land and improvements thereon capable of producing a large amount of coal annually, and which has produced 106,980 tons since June 1st, which land is under lease to A. Pardee & Company, who pays this company an annual rental per ton for the coal mined therefrom. Also the unsold portions of a town called Hazleton, together with all the houses, buildings and fixtures belonging to the two railroad companies and those belonging to the lessees, which pertain to the working of the roads, including a stone engine house, with stalls for twenty-one engines, and a complete set of shops of stone and brick of a substantial character well furnished with tools, machinery and facilities for building and repairing engines, cars, machinery for the mines and collieries of the region, most of whom rely mainly on these shops for such work. Also a large amount of iron, timber and other materials on hand and all the rolling stock belonging to both these roads and to the lessees."

Therefore this merger, like the Beaver Meadow merger, did not involve the Lehigh Valley Railroad Company in the mining of coal, because the coal

of the Hazleton Company had been leased to A. Pardee & Company, and so continued for many years. The report for this year also shows that the management had taken some steps to protect the existence of the company's lines in pursuance of the suggestion made in the report to the stockholders for the previous year. Government Exhibit 107 (R., 920) quotes the report in question. Let it be known that the thing which claimed the earnest attention of the Board was "the subject of securing the control of tonnage for our road from regions having other outlets to market"; in other words, the securing of a thing competed for, which is the essence of competition. So vital was this necessity that it was concluded to make arrangements to insure a traffic for each of the branches, and in pursuance of this necessity came the merger of the Hazleton Railroad Company, but the fact that the trading in coal was in no sense contemplated in that transaction is shown by the fact that the coal lands of the Hazleton Company, as well as those of the Beaver Meadow Co, were developed under leases at all times thereafter, under which leases the mines were worked by outside parties. It was the most natural thing, as well as the economic and proper thing, for the lessee of coal lands to send his tonnage to market via the line of railroad owned by the lessor; in fact, it might well and legally at that time have been made a condition of the lease, as was the case in another instance of the Lehigh Valley System, *i. e.*, the lease of the State Line & Sullivan Railroad Company's coal lands in the Bernice Region in Sullivan County, Pa.

The report for this year speaks of the purchase of stock in coal companies having tracts of land

"sufficient of themselves, when properly developed, to furnish us with a *coal tonnage* equal to that now moved by us from" the Wyoming and Mahanoy regions (R., 920). The situation in that respect is this: In March 31, 1868—Railroad Exhibit 22 (R., 2170)—the Legislature of Pennsylvania authorized railroad companies to invest in "good stocks or securities and to sell and transfer the same and to reinvest the proceeds of such sales in securities or stocks of like kind," etc. Government Exhibit 6, Record, 586, which is an extract from the Minutes of the meeting of the Board of Directors of the Lehigh Valley Railroad Company held on October 14, 1868, shows that authority was given in pursuance of the authorization given in the Act of March 31, 1868, to the executive officers of the Company to purchase the stock of the Coal Ridge Improvement and Coal Company and the Locust Mountain Coal & Iron Company "for the purpose of securing a future tonnage to our road." Government Exhibit 103 (R., 884) shows that accordingly about three-fourths of the stock of the Coal Ridge Improvement & Coal Co. was thereupon secured, but no stock of the Locust Mountain Coal & Iron Company was secured until two years later (R., 895). The Coal Ridge Improvement & Coal Co. owned but a small amount of land, which it held until 1904, and it was then transferred to the Westwood Coal Company, which, in turn, in 1905, was merged with the Hazleton Coal Company, which, in turn, was merged with the Lehigh Valley Coal Company, or some thirty-five years after the acquisition of the stock by the Railroad Company (Petition, p. 19).

1869: March 17 an Act was passed (Railroad Exhibit 23, R., 2171), giving any railroad company

of the State the right to purchase and hold the stock and bonds, or either, or to agree to purchase or guarantee the payment of the principal or interest, or either, of the bonds of any other railroad company or companies. Following out the authority contained in the Act of March 31, 1868, and to leave no doubt as to its meaning there was passed an Act of April 16, 1869 (Railroad Exhibit 24, R., 2171), which reads as follows:

> "That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this Commonwealth by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either, of such bonds; provided that this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the County of Schuylkill."

Three years later an exception was made to the proviso in reference to Schuylkill County companies in respect of the Delano Land Co., (Railroad Exhibit 25, R., 2172). The Government has contended that the proviso as to Schuylkill County has not been observed by the Lehigh Valley Railroad Company.

In the first place, the Act of March 31, 1868 (Railroad Exhibit 22, R., 2170), makes no reference to Schuylkill County and its title says that it is an Act "to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks and other securities, and fixing the time for holding elections for directors." The unsoundness of the Government's contention, that the words "other companies' stocks or securities" are to be

considered to mean securities of the same general class as the Public Debt of Pennsylvania or Philadelphia, is clear, for three reasons. First, there never was a stock of any company of the same general class as the Public Debt of Pennsylvania or Philadelphia. Secondly, the title of the Act itself is broad and general in its classification of stocks and other securities. Thirdly, the case of *Commonwealth v. Buffalo & Susquehanna Railroad Company*, 25 Pa. C. C., 274 (1902), construed the Act as applying to the stock of Railroad companies, and if the stock of the Susquehanna & New York R. R. Co. is in the same general class of securities as the Public Debt of Pennsylvania or Philadelphia, then certainly the stock of the Lehigh Valley Coal Company is. The Lehigh Valley Coal Company succeeded to the Charter rights and privileges of the Green Land Company, and the Charter of the Green Land Company (Coal Company Exhibit 2, R., 2647), clearly gave it the right to own and mine lands in Schuylkill County as well as other counties.

Neither does the proviso in the Act of April 15, 1869, aid the Government's point. Parenthetically it may be said that this whole point is foreign to this case because if the policy of the State of Pennsylvania has not been observed in the acquisition of the stocks in question the State is the one to raise the question, and the fact that it has not raised the question for a period of over forty years is pretty clear evidence that that policy has not been violated. But let us turn to the proviso. The proviso means that a company chartered to do its principal business in Schuylkill County may not be purchased by a railroad company, and the stock of no such company has ever been purchased by the

Lehigh Valley Railroad Company except the stock of the Delano Land Company, which was *specially authorized by the Act of 1872.* Even relying solely on the Act of 1869, there is nothing in the proviso to prevent or intending to prevent the Railroad Company from purchasing the stock of Coal Companies authorized by their charters to mine principally in other counties and to extend their business under their own charters to Schuylkill County incidentally. The Lehigh Valley Coal Company has acquired but a small percentage of land in Schuylkill County, purely incidental to its main business and has but three collieries in that County (Railroad Exhibit 54, R., 2395). Coxe Bros. & Co., Inc., have a small overlying tract in Schuylkill County, and no colliery (*Id.*).

4. *The vital relation of the carriage of anthracite coal to the continued existence of the Lehigh Valley Railroad.*

The Railroad Company not only began to compete on a larger scale with other carriers but began to afford the producers on its lines larger markets for the distribution of their products. Under the authority of the Acts of 1868 and 1869 the Company was enabled to assist in the development of the anthracite regions themselves, thereby affording a larger traffic, and, in return for that assistance, naturally and properly and lawfully expected and received the carriage of the thing produced. And, indeed, as the railroad system was extended to carry the thing produced, the carriage thereof became vital to its continued existence. Such was both a normal and lawful relation and result.

We have up to this point a few miles of gathering lines in the Lehigh Region, concentrating near

Mauch Chunk and having an outlet to the east down the valley of the Lehigh River to the Delaware River and there connecting with several other railroads and canals. To the north we have a line built over the Wilkes-Barre Mountain with spurs connecting with several mines and the extension of the line north as far as New York State. With the exception of the rather at that time unimportant extension to the north, the Company had remained virtually dormant for many years. Turning to the chart which shows graphically the growth of the Company's construction and corporate organization—Railroad Exhibit 37 (R., 2286) —it will be seen that from this point on there is a gradual rise in the corporate growth of the Company, but an enormous rise in the growth of mileage. As stated before, the merchandise business of the Company was farmed out to a distinct and separate organization, the Lehigh Valley Freight Company, and the Railroad Company devoted its entire operating efforts to the transportation of coal (R., 1154). The general summary of the growth to this point is contained in Mr. Wilgus' testimony (R., 1185-6).

1870. Following out the authority of the Resolution of 1868 (R., 586), the Executors of the Company made their first important investment, namely, by buying more than a majority of the stock of the Locust Mountain Coal & Iron Co. (R., 895). The report of the Company for the year 1870 (R., 2149) states "the anthracite coal tonnage on our road for the past year has been heavier than ever before and exceeded that of any other road in the country. The rates of transportation averaged 1/8 cent per ton per mile less than last year."

Let us epitomize the situation up to this time:

The Lehigh Valley Railroad up to 1867 has acquired its main line in the State of Pennsylvania, that is, a line has been built along the valley of the Lehigh River between Mauch Chunk and Easton. Then over the Wilkes-Barre Mountain to Wilkes-Barre, and from Wilkes-Barre north along the bank of the Susquehanna River, and the old North Branch Canal to the New York State line. From the standpoint of its through business, this was and still is the main line of the Lehigh Valley Railroad. From the vicinity of Mauch Chunk, namely, at Penn Haven Junction, it extended into the Lehigh, Shamokin and Shenandoah coal regions, and those small connecting lines had, with the authority of the Pennsylvania statutes, been merged with the main line company. In other words, with the exception of the Delaware, Susquehanna & Schuylkill Railroad, the main line in the State of Pennsylvania of the Lehigh Valley Railroad, both in its trunk line system and in the coal regions, had been fully acquired, and had the following constituent parts:

Beaver Meadow Railroad,	25	miles
Lehigh Luzerne Railroad, about	10	"
Lehigh & Mahanoy Railroad, about	40	"
Hazleton Railroad, about	23	"
Lehigh Valley Railroad proper,	50	"
Penn Haven & White Haven R. R., about	20	"
Extension, White Haven to Wilkes-Barre,	30	"
White Haven to the New York State line, about	97	"

The first four companies above mentioned, together with the Delaware, Susquehanna & Schuylkill Railroad, now constitute the Mahano & Hazleton Division of the Lehigh Valley Railroad.

Now, as heretofore noted, at that time the Lehigh Valley Railroad Company did not own stock in a single coal company and apart from traffic, where its interest was vital, its only interest of any kind in the coal lands was the interest it had acquired therein through the merger of the Beaver Meadow Company and the Hazleton Company, both of which companies had never mined their own lands but had leased them out for operation, which policy was continuously pursued by the Lehigh Valley after the mergers; in other words, with its lines in the gathering regions virtually complete, to the same extent as they exist today with the exception of the Delaware, Susquehanna & Schuylkill Railroad, the Company was not the owner of stock or bonds of any coal company, although its system had been built up solely for the transportation of anthracite. But what gave rise to its acquisition of those interests from this time on?

The annual report for 1867, quoted above, refers for the first time to the acquisition of any interest in a coal company and refers to it in connection with the *necessity of protecting the traffic* of the extension just then made into the Wyoming region. In other words, it was because of the competitive traffic situation. In the Wyoming region there was, first, the Lehigh & Susquehanna Railroad, now part of the Jersey Central System and practically paralleling the Lehigh Valley all the way to the Delaware River; second, the connection which the Lehigh Coal & Navigation Company had with that region; third, the Delaware, Lackawanna & Western Railroad; fourth, the Delaware & Hudson Railroad; and fifth, the Erie Railroad.

In the Lehigh region there was the competition of the Lehigh and Susquehanna Railroad Com-

pany, of the Lehigh and Susquehanna Railroad, and of the Pennsylvania Railroad.

The Lackawanna and the Delaware & Hudson Companies owned and operated their own mines. Now came the Act of 1868 and the Act of 1869, above mentioned, and each of these Companies was empowered in addition to the powers already possessed, to invest in the stock and bonds of coal companies and each began to encourage anthracite development along its respective line by making such investments, and normally and properly expected to receive the haul of the coal produced by the Company in which it had made the investment. Therefore, the Lehigh Valley was obliged, as a matter of self-preservation, to recognize this keen competitive situation and to begin from this time to acquire the stock of coal companies having mines contiguous to its line and, as such stockholder, to express the desire, as it lawfully and properly might do, that the coal mined should be routed over the Lehigh Valley line.

1871: In this year the Lehigh Valley Railroad Company acquired the stock of the Luzerne Coal & Iron Company (R., 896 and 1131). In this connection reference is made to the testimony of Mr. E. B. Thomas, the President of the Lehigh Valley Railroad Company, given in the General Conspiracy Case or old Reading Case, reported in 226 U. S., and which was stipulated into the record in this case. At page 432 of the present record is Mr. Thomas' testimony in respect of this point:

> "'Q. It appears already in evidence by the Government that the Lehigh Valley Coal Company, whose stock is owned by the Lehigh Valley Railroad Company, is the owner of large amounts of coal lands from which coal is produced, adjacent to and tributary to the Le-

high Valley Railroad Company. Can you state generally how it came about that the Lehigh Valley Coal Company acquired these lands? Was it in combination or by arrangement with another railroad company, or was it in competition with the other railroads? A. As I read the history of the Lehigh Valley Railroad, and as I know it on the other roads, their sole object in acquiring coal lands was to protect the tonnage and to secure tonnage to their own lines.

"Q. And to prevent it from going to other railroads? A. And to prevent it from going to their competitors. The competition between these anthracite roads has at times been very severe for tonnage; that is, for the acquirement of tonnage and for the acquirement of coal lands which would secure to their lines the business, and as much tonnage as they could control.

"Q. The carriage of anthracite coal is the principal business of the Lehigh Valley Railroad, is it not? A. It is about fifty per cent. of its volume of business; from forty to fifty per cent. It has been as low as forty and been over fifty. It is about fifty per cent. today.

"Q. You refer now to coal carried? A. I refer now to coal transported.

"Q. Is it not true also that a great deal of the remaining half of the company's business is incidental to and due to the coal business along the line, dependent upon it? A. The Lehigh Valley is a trunk line and carries a considerable portion of the east and westbound traffic between the Hudson River and the Lakes; but the bulk of its business is the anthracite coal. It has no bituminous coal of any particular amount and, outside of its anthracite coal, its traffic is made up of such things as pig iron, ore, and such matters in the Lehigh Valley, and grain from the Lakes, and general traffic. A great deal of that, of

course, is consumed in the anthracite coal region.

"'Q. Leaving out the other traffic, in grain and packing products, is it not true that a large part of the other traffic, local traffic on that line and passenger traffic, except anthracite coal, is due to and dependent upon the anthracite traffic along the line? A. If anthracite coal was not there, was not mined and transported, it would be a howling wilderness along the line of the Lehigh Valley Railroad.

"'Q. Take, for instance, the purchase of the Coxe Brothers property in 1905 by the Lehigh Valley Company, which has been in evidence in this case. Was that due to any arrangement that was made with any other railroad, or was it due to competition between the railroads for coal properties for the maintenance of their tonnage? A. It was due to my efforts to secure, and to retain, to the Lehigh Valley Railroad the tonnage which belonged to it. Originally that tonnage was carried by the Reading Railroad. It was taken away by the Lehigh Valley, by the building of the connection.'"

So also Mr. Baird, an officer of the Lehigh Valley Railroad Company since 1873, was asked to and did corroborate the testimony he gave in the Old Reading Case, which testimony appears at page 505 of the present record and is as follows:

"'Q. Do you know why the Lehigh Valley Railroad Company bought the stock interests in the D. S. & S. and Coxe Brothers and Company in 1905? A. They purchased it undoubtedly for the purpose of assuring the tonnage of the Coxe mines to the Lehigh Valley System.

"'Q. To prevent the possibility of its going to the Pennsylvania Railroad or some other railroad? A. Yes, sir.

"'Q. You spoke yesterday on cross-exam-

ination of the Lehigh Valley having acquired the Seneca Coal Company, Connell Coal Company, and certain other coal companies within recent years, and having turned them over to the Lehigh Valley Coal Company. Did you mean that the Lehigh Valley Railroad had acquired the property or had acquired the stock of those companies? A. I meant to say that the Lehigh Valley Railroad Company acquired the capital stock of the respective companies named.

"'Q. Did the Lehigh Valley Railroad Company buy any coal lands or coal property? A. From these companies?

"'Q. From these companies, yes. A. No, sir.

"'Q. But only bought stock in the companies? A. Yes, sir.

"'Q. And transferred that stock afterwards—disposed of it—to the Lehigh Valley Coal Company? A. Yes, sir.

"'Q. For what purpose were the stocks of those coal companies bought? A. To assure the tonnage from the mines on the various properties to the Lehigh Valley system.

"'Q. And to prevent its going to some other railroad? A. Yes, sir.

"'Q. Has there been during the past years, and since the reorganization of the railroads, competition between the railroad companies for the coal tonnage in the anthracite coal regions? A. Yes, sir.

"'Q. Is that the reason why the Lehigh Valley Railroad Company had acquired interests in the stocks of coal companies? A. Yes, sir.

"'Q. If the coal stocks which have been acquired by the Lehigh Valley Railroad Company had not been acquired by it would it, in your judgment, have been possible for the Lehigh Valley Railroad to have continued as an operating railroad corporation? A. No, sir.

"'Q. Why not? A. It would have lost all the valuable coal tonnage.

"'Q. You mean it would have gone to competing railroads? A. It would have gone elsewhere to competing railroads.

"'Q. Take, for instance, the Seneca Coal Company, which is one of the companies mentioned yesterday, and the stock of which was acquired by the Lehigh Valley Coal Company in 1900. Where was that located? A. In the Lackawanna Valley near Pittston.

"'Q. Near the lines of the Lehigh Valley Railroad? A. Yes, sir.

"'Q. Was it at the time of the purchase, its whole output, tributary to the Lehigh Valley? A. I think so.

"'Q. Was there at that time danger that that coal or some of it would go to some other railroad? A. I think so.

"'Q. When I say "go to some other railroad" I mean the tonnage pass over the lines of some other railroad? A. Yes, sir.

"'Q. What other railroad? A. The Lackawanna.

"'Q. And is that situation true either as to the Lackawanna or some other competing road as to the rest of these coal companies that you mentioned yesterday? A. I think it is.

"'Q. When I say "mentioned yesterday" I mean about which you were asked by Mr. McReynolds yesterday on cross-examination? A. Yes, sir.

"'RECROSS-EXAMINATION BY MR. MCREYNOLDS:

"'Q. You have just said that but for the purchase by the Lehigh Valley Railroad Company of the sundry coal companies which it has acquired from time to time that its tonnage of hard coal, in your opinion, would have gone to other roads. Are there other railroads which compete with the Lehigh Valley for the coal tonnage? A. Yes, sir.

"'Q. What are those roads? A. Phila-

delphia and Reading Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company, the Delaware and Hudson Company, the Pennsylvania Railroad Company.

"Q. How about the Erie? A. That is also a competing line.

"Q. All those roads now are competing for the hard coal traffic? A. I believe so.

"Q. And they all carry coals from the coal regions in Pennsylvania into other States? A. Yes, sir.

"Q. Which is the most active competitor which the Lehigh Valley Railroad has? A. That would be a hard question to answer from my standpoint.

"Q. They are all active competitors? A. They are all active competitors.

"Q. Each one of them is seeking the coals to take over its own lines to tide-water here at New York or other points in other States? A. Yes, sir.

"Q. How long has that condition been existing in the coal regions? A. I think it has been existing since 1867 or 1868.

"Q. And in order to gather to itself the control over the traffic lying in close proximity to those lines you think the Lehigh Valley Railroad Company purchased these various coal companies? A. Yes, sir.

"Q. Which enables them to ensure the passing of that coal over its line? A. Yes, sir.

"Q. How does it enable it to do it? A. By control; stock ownership.

"Q. What do you mean by "control"? Do you mean that the Lehigh Valley Railroad because of that stock ownership is able to dictate to these companies what lines their coal shall pass over? A. Yes, sir.

"Q. There is no difficulty about that condition, is there? A. I do not think so.'

"Q. Is that correct? A. The testimony is correct, but I would like to emphasize the fact

> that the purchase of these stocks was more in the line of keeping on to the Lehigh Valley—retaining in the Lehigh Valley—the tonnage that is already possessed."

As shown above, the coal which the Lehigh Valley carried to Easton could there be delivered to several connecting lines, the Morris & Essex line, the Jersey Central line, the Pennsylvania Railroad line, the Delaware Division Canal and the Morris Canal. Having so large a tonnage as the Lehigh Valley Railroad then did, it was only natural that it should seek its own independent outlet to the largest market, namely: the New York market, and it accordingly made a lease of the Morris Canal in the year 1871, the results of which lease were referred to in the report of the Company for that year as follows:

> "The Board are satisfied that the lease will result advantageously to this Company. This has been experienced already in the greatly increased capacity for tonnage over our main line without material increase of rolling stock, in consequence of our being able to discharge the cars into boats at the end of our road and return them at once to the mines" (R., 2149).

An extension of the Hazleton branch in the Lehigh region is also mentioned in this report, and in connection therewith the report states:

> "Very little has been done during the present year toward the development of the coal in Black Creek Valley, but it cannot be long before a large coal tonnage will be offered for transportation from this basin, now fully opened to all markets by the completion of the extension above named" (R., 2150).

The Government has introduced as an Exhibit (Government Exhibit 7, R., 587) an agreement made this year between the Philadelphia Coal Company and the Lehigh Valley Railroad Company relative to the purchase of $200,000 of bonds of the Philadelphia Coal Company. It so clearly states the intention of the Railroad Company in exercising the authority given to it by the Acts of 1868 and 1869—namely: the assistance in the development of the regions and the securing of the tonnage to be carried—and so clearly negatives any charge in respect of the Railroad's attempt to secure an interest in the sale or merchandising of coal, that it ought to be quoted here at length, but as it is fully set out in the Government's record (pp. 587 to 589), we will only refer to the salient points. First, what was the consideration? It was the agreement of the Lehigh Valley to purchase $200,000 of bonds in return for an agreement that the Coal Company would ship over the Lehigh Valley all the coal it mined; and secondly, where was the coal to go? It was to go "to any points on the line of their said road *or connections*", and the coal was not to be shipped by any other route to market, except one colliery which might ship by any route until the Lehigh Valley had completed a branch road to it.

Again, the Railroad Company covenanted that they would "transport the coal thus shipped on terms as favorable for tolls, freight and other charges for carriage, delivery and transportation as from time to time shall be charged by them to any other person in the Mahanoy region shipping over their road, according to the regulations from time to time adopted, which shall extend to all alike and without discrimination between persons

similarly situated as respects distance to be carried." Nothing can more clearly evidence the fact that the sole motive for this investment was the encouragement, through the purchase of the bonds, toward development of the lands owned by that Coal Company in order that the Lehigh Valley Railroad might haul the traffic.

1872: In this year the Luzerne Coal & Iron Company, above mentioned, and the Green Land Company merged and shortly after took the name of the Lehigh Valley Coal Company (R., 1131), and as the Lehigh Valley Railroad Company had acquired the stock of the constituent companies, having acquired this year the stock of the Green Land Co., it received in return for the surrender thereof all the capital stock of the Lehigh Valley Coal Company (R., 1131, 1476). In this year also the Railroad Company acquired more than a majority of the capital stock of the New York & Middle Coal Field Railroad and Coal Company owning a small tract of land in the centre of the Lehigh region, the location of which is shown in Lehigh Valley Coal Company Exhibit 4 (R., 2650). That Company has always leased out its land for mining by other parties. See, for example, lease to the Midvalley Coal Company, Government Exhibit 102 (R., 881).

The Government has referred to the annual report of the Company for this year, which speaks of acquiring an interest in coal lands known as the Delano lands (R., 921), but that inaccurate use of language at that time cannot change the real fact of the matter, which has been clearly proved in this case, that what was acquired was the *stock of a Company* which owned those lands (R., 1144). This was the Delano Land Company, which also

leased its lands for operation to the Buck Mountain Coal Company, an outside concern (R., 4629), and later to Lentz, Lilly & Company, an outside concern. See Government Exhibit 102 (R., 882, 883). No doubt the interest which the Railroad Company had as a stockholder in the Delano Land Company caused the latter Company to insert in the leases of its lands the clause that the coal mined therefrom should be shipped, so far as possible, over the Lehigh Valley Railroad. The Act incorporating the Delano Land Company, approved March 15, 1872, specifically authorized the railroad and canal companies to purchase the stock or bonds thereof—Railroad Exhibit 25 (R., 2172).

The futility of canal competition against the railroad lines which traverse the State of New Jersey soon convinced the management of the Railroad that its lease of the Morris Canal would not effect the object it desired, namely, the expeditious transportation of coal to New York Harbor. Therefore the Company caused to be incorporated this year the Easton and Amboy Railroad (R., 1118), a terminus for which at tidewater had been secured at Perth Amboy, N. J. (R., 921). Construction of the line was begun this year, but it was several years before it was completed. Large coal piers were built at Perth Amboy for transshipment of coal into boats, and the terminal property developed exclusively for the handling of anthracite. Mr. Wilgus has described this terminal as one highly developed and efficient for the purpose for which it was constructed (R., 1191).

1875: This year the Easton & Amboy Railroad was completed across the State and the transportation of anthracite to Perth Amboy for transshipment begun (R., 1119, 2150). Also the first step

was taken for the development of a line in the State of New York for the movement of westbound traffic. This was through the purchase at a foreclosure sale of the Geneva, Ithaca & Athens Railroad Company, which connected with the Pennsylvania & New York Canal & Railroad Company, above mentioned, at the New York state line and travelled northward by way of Ithaca to Geneva, and also by way of Ithaca to Cayuga, at both places making connection with the New York Central System (R., 1120).

1876: The report of the Company for this year refers to the guaranteeing of the bonds of the Delano Land Company, which owned 5,229 acres of land in Schuylkill County. Also refers to the development of the terminal at Perth Amboy and to the north refers to the building of a cut-off line around the Wilkes-Barre Mountain, in order to avoid the heavier grades and shorter curves on the line over the Mountain (R., 2153).

The minutes of a meeting of the Board of Directors for this year also refers to an advance of $180,000 to the Lehigh Valley Coal Company "for the purpose of securing certain coal tonnage to the road"—Government Exhibit 8 (R., 590). It has not been shown what company was referred to in respect of this acquisition, but it is clear that the object thereof was the "securing of tonnage"—in other words, the coal freight traffic. It was in all probability the acquisition of more shares in the Coal Ridge Improvement & Coal Co. and the Locust Mountain Coal & Iron Co. (R., 884, 895).

1877: Again, the minutes of a meeting of the Board of Directors held this year refers to this advance "for the purpose of securing certain coal tonnage", and makes it clear that the advance was

financed by receiving bonds of the Lehigh Valley Coal Company at 97½ (R., 590).

The annual report of the Company for this year refers again to the necessity of reducing coal rates and the fact that the rates "are now lower than in any previous year in the history of our road *and show a steady decline from the year 1867*" (R., 2154), no doubt due to the competition which the producers located on the Lehigh Valley lines were meeting in markets where the Lackawanna and Delaware & Hudson Companies sold coal, as has been mentioned before. It is particularly noteworthy in respect of the contention of the Government that rates were kept high and unreasonable to favor the Lehigh Valley Coal Co.

It is also noteworthy that the report for this year refers to the effect upon the traffic of the road due to operating conditions in the coal regions. The report says (R., 2154):

> "The protracted strike of the miners in the Wyoming region, from which our tonnage is derived, principally involved irregularity in our business, and prevented so great a reduction in the operating expenses as would otherwise have resulted. The lower rates obtained for transportation of coal, and the great falling off of travel, reduced the income from both those sources in the aggregate $173,996.92".

1881: The purpose of securing the stock interest by the Lehigh Valley Railroad Company in the Lehigh Valley Coal Company is shown by the remark in the annual report for this year—Government Exhibit 107 (R., 922)—where, referring to the amount of coal produced by the collieries owned and operated by the Lehigh Valley Coal Company and the amount shipped by tenants of the Coal

Company and from lands controlled by it, there is this enlightening remark:

> "The above tonnage was almost entirely shipped over the railroads owned and controlled by the Lehigh Valley Railroad Company and shows a gratifying increase."

1885: The annual report of the Company again refers to the fact that "The greater portion of the foregoing tonnage" (referring to the tonnage of the Lehigh Valley Coal Company and its tenants) "has been transported to market by railroads owned, operated or controlled by the Lehigh Valley Railroad."

1887: The attention of the Company this year was directed to the building of a line north from the Easton & Amboy Railroad at South Plainfield in New Jersey, for the purpose of getting closer to New York City (R., 1119).

1888 to 1895: During this period there was, in 1888, a lease made of the Pennsylvania & New York Canal & Railroad Company to the Lehigh Valley Railroad Company (R., 1120).

In 1889 a branch line was extended north from Easton, built under the name of the Easton & Northern Railroad Company (R., 1123).

Up to 1890 several companies had been projected in the State of New York and other railroad properties purchased, all of which in 1890 were merged into the Lehigh Valley Railway Company, giving the Company a direct line to Buffalo (R., 1122). Previous to this time the coal had secured an outlet via the railroad connections with the New York Central System and also by means of a trackage arrangement which the Company had with the Erie Railroad, by which it ran its trains for several years on one rail of the Erie Railroad—which at

that time had a six foot gauge—and on one rail of its own.

In this year there was opened (R., 2155) a railroad to form a direct connection between the Lehigh Valley and the Schuylkill region known later as the Schuylkill & Lehigh Valley Railroad Company, of which the Lehigh Valley Railroad Company owns all the capital stock (R., 1123). It is sometimes referred to as the Schuylkill Branch and at others as the Lizard Creek Branch—Railroad Exhibit 16 (R., 2132).

For 1891 the report of the Company refers to the irregularity of the anthracite traffic on account of the operating conditions in the mining regions, and goes on to say (R., 2156):

> "There has been for many years a decline in the average rate per ton on anthracite coal——. The rate per ton per mile has shown corresponding falling off——. These reductions are due mainly to shorter hauls and to increased tonnage of the smaller sizes of steam coal which are carried at reduced rates. The loss in revenue thus occasioned has directed the attention of the management to the desirability of increasing the busines of the road in other directions, as well as to an increase in its coal tonnage. The miscellaneous freight tonnage has increased under this policy
>
> From 3,633,178 tons in 1888
> to 4,205,713 " " 1889
> 4,971,706 " " 1890
> 5,230,913 " " 1891
>
> and was only limited during the latter part of the past year by lack of proper equipment and facilities."

Again referring to the extension of the road into the Schuylkill Valley, the report for 1891 says (R., 2157):

> "The extension of our road by the construction of the Schuylkill & Lehigh Valley Railroad will open up a very large tonnage of anthracite coal tributary to our lines. Its development has been slow because of our other sources of supply, but the operations of the Lehigh Valley Coal Company in that territory have demonstrated a far larger yield therefrom than was expected."

The report for the year 1893 refers to the delivery of coal to the New York, New Haven & Hartford Railroad Company by transfer of cars on floats between Jersey City and the Harlem River opening up *"to the operators on our line a large and valuable territory for delivery of coal direct from the mines in cars throughout the New England States,* in addition to that previously accessible by the Poughkeepsie Bridge route" (R., 2158). The report also calls attention to the loss of revenue from the transportation of anthracite coal "and the consequent necessity of increasing other kinds of traffic by new connections" (R., 2158). The anthracite traffic during the previous six years is referred to and it is said:

> "The course of this business during the past six years shows that, while the tons carried one mile had in this period increased between 4 and 5% the resultant revenue has decreased nearly 12% (R., 2158).

The miscellaneous freight traffic is referred to during the same period and its increase said to be "due to the extension of our line and the encouragement given to miscellaneous freights between the seaport and the west" (R., 2159).

The Company had reached a precarious condition. All advances to the Lehigh Valley Coal Company up to that date had been discharged by the receipt of bonds of the Coal Company, which, in turn, had been sold to the general public and individual coal operators at par and interest, with the guarantee of the Railroad Company—Railroad Exhibit 18 (R., 2159)—but in spite of the clearing of that account and due to the business panic which had fallen upon the entire country and the enormous extensions of the Railroad Company which had been projected in New York State, and on account of the falling off of the anthracite traffic, the Railroad found itself unable to continue the payment of dividends and the report of the stockholders for the year 1894 contains the following paragraphs (R., 2160):

> "It has been a matter of much disappointment to your officers and to all interested that the trade conditions of the country have not so improved as to produce net earnings sufficient to justify the resumption of dividends. These conditions are clearly reflected in the tonnage and revenue statements already submitted. While the total tonnage of the past year shows a decrease of 653,693 tons, or nearly 4 per cent., the tons carried one mile (the true test of transportation service rendered) increased 103,098,958 tons, or over 5 per cent.; yet the transportation earnings from all sources decreased over $1,250,000, as compared with those of the previous year.
>
> "The condition of the anthracite coal trade, upon which the Company is so largely dependent, has been particularly bad—worse during 1894 than in the previous year, and especially so near the close of the fiscal year. It will be noted in the foregoing table of rates realized per ton per mile for transportation of all classes of freight during the year, that the rate

in 1894 was 76/1000 cents per ton less than in the previous year. This upon the tonnage carried was more than $1,600,000, or 4 per cent. upon the capital stock of the Company.

"Of a total tonnage of anthracite coal during the year amounting to 11,103,157 tons of 2000 pounds each, 2,321,390 tons were of coal hauled in the trains of other companies over our tracks, much of it very short distances; 878,180 tons were of coal for use of our own locomotives; and 511,313 tons were of coal in our own trains, giving a short lateral haul between the mines and junctions with other lines controlling the transportation of the coal. These items together constitute 33 4/10 per cent. of the total anthracite tonnage of the year, leaving a tonnage of 7,392,274 tons of 2000 pounds each distributed to local points in our territory and to terminal points and junctions other than those in the immediate neighborhood of the mines."

In 1890 the stockholders, seven in number, of Coxe Brothers & Company, Inc., had incorporated the gathering tracks which served their collieries into a company known as the Delaware, Susquehanna & Schuylkill Railroad Company—Railroad Exhibit 15 (R., 1123, 2128). For a time there was a keen competition betwen the Reading and the Lehigh Valley Railroads to secure the tonnage gathered by this line, and in 1894 the Lehigh Valley Railroad was successful in obtaining a contract from the D. S. & S. Railroad Company, whereby that Company was granted the privilege of running its own trains loaded with coal to Perth Amboy. The annual report of the Company for 1894 refers to this contract as assuring to the Railroad for a term of fifteen years an important traffic for which several other outlets existed and which had been in contention for some time pre-

vious—Government Exhibit 107 (R., 924) and Government Exhibit 11 (R., 591).

In 1895 the Southern Central Railroad, which was an outside line connecting with the Lehigh Valley near the New York state line, came into difficulties and was sold and reorganized as the Lehigh & New York Railroad Company. In the hope that a general development of traffic might take place particularly on account of the outlet which this line gave to Lake Ontario, a lease of the line was secured August 24, 1895, and it has since been operated thereunder (R., 1122).

After this date there is little more involved in the extension of the Railroad System than the building of some subsidiary lines and branches in the State of New Jersey, all of which were in 1903 consolidated into a company called the Lehigh Valley Railroad Company of New Jersey, which later, under the authority of the State of New Jersey, was leased to the Lehigh Valley Railroad Company (R., 1119). Also the acquisition of a company in 1896 called the Elmira, Cortland & Northern Railroad, extending easterly for some distance into New York State reaching various points competitive with the Lackawanna, Erie and New York Central Systems (R., 1187). In 1905 this Company was merged with the Lehigh Valley Railway Company —Railroad Exhibit 16 (R., 2132).

On June 30, 1913, the Company's mileage consisted

of a main line mileage from New York to Buffalo of.....	446.03 miles
a main line mileage into the Lehigh region of	52.34 "
a main line mileage *north* into N. Y. State of	116.78 "

all of which, together with branches and trackage rights, constituted:

A total first track mileage of.....	1438.90	miles
" " second " " "	596.05	"
" " third " " "	92.34	"
" " fourth " " "	44.84	"
" mileage of yard tracks and sidings of	1182.70	"

or a total of all track mileage, including yards and sidings, of 3354.83 miles—Railroad Exhibit 17 (R., 2133).

The growth of the capital obligations of the Company for the extension and development of its railroad system is set forth graphically in Railroad Exhibit 38 (R., 1189, 2287), and the growth of its tonnage is shown graphically in Railroad Exhibit 39 (R., 1189, 2288). The anthracite traffic, as will be seen from this Exhibit, increased considerably more than the other freight traffic up to 1890. Excluding the coal which moved over the rails of the Lehigh Valley by trackage rights given to other lines, the anthracite tonnage of the Company remained about stationary from this point to 1903, and then began to rise again, amounting at the end of 1913 to a total of more than 14,000,000 tons. Between 1897 and 1898 the other freight traffic of the Company, however, passed in volume the anthracite traffic and has continued above it ever since, increasing in greater proportion for most of the time.

Railroad Exhibit 40 (R., 2289) shows an increase in the revenue per ton per mile for anthracite up to 1864 and a large general decline in revenue per ton per mile therefrom between that point and the year 1900, since which time the revenue per ton per mile has been virtually unchanged. The reason

for the practical stability of the revenue in this later period—that is, from 1900 to date—will be seen later to be due to the application of the tariff rates during that period, in place of the use of the so-called percentage rates which all shippers of coal on the railroad enjoyed up to that period, the details of which are explained in the report of the Interstate Commerce Commission in the Meeker Case, Government Exhibit 64 (R., 712). The general characteristics of the road and its primary development—or, in fact, its virtually exclusive and necessary development—up to about 1893 for the opening of the coal regions and the transportation of anthracite are described in detail by Mr. Wilgus (R., 1203-1206). Bearing in mind the fact that the Railroad bought no stocks or bonds of coal companies until the authority and encouragement therefor were given by the Acts of 1868 and 1869, and the fact that up to that time the principal part of its system was complete in the State of Pennsylvania, what conceivable theory is there for the further development of the railroad system, *i. e.* its extensive projections across the State of New Jersey and northerly and westerly in the State of New York, other than its desire to become a trunk line carrier and to acquire its independent outlets to the larger cities in the East and West for the anthracite traffic which originated on its lines and the carriage of which it had to hold to preserve its existence? From the very time when it began to acquire the stocks *i. e. in* 1869, 1870 and 1871, it extended its lines into localities already receiving anthracite coal over well-developed railroad lines. It is a matter of public record that the Lehigh Valley Railroad was the last of the trunk line systems to be opened. On the east, New Jersey and New

York City were supplied by the Reading, the Lackawanna, the Erie and the Pennsylvania Railroads, each of which carried large volumes of anthracite. Western New York was supplied by the Lackawanna, the Erie, the Pennsylvania and the New York Central's connections with the Reading. Now, then, could any thought of monopoly have been involved, or any restraint of trade? It was rather a fostering or an increase of trade; it was an entering by the Lehigh Valley into the fields of competition. It came to points reached by these other systems because it had a large anthracite traffic originating on its lines which it had to carry in order to live and it believed it would be a profitable investment to extend its railroad system to these larger and greater markets for the consumption of such products. That again fostered trade. It encouraged commerce. It added another factor in the competition.

Railroad Exhibit 57 (R., 2309) shows the normal and steady growth of the traffic in anthracite from the beginning, and shows that this extension of the railroad system into New York and New Jersey involved no sudden leaps and bounds in the amount of tonnage carried after the Company began the acquisition of Coal Company stocks. The tonnage of the Company in 1868 was 2,603,000 tons. The next year the Company began, as noted, the acquisition of stocks to secure the tonnage it then had as a matter of self-preservation against its competitors, and that this acquisition had no other effect than the mere holding the tonnage theretofore carried is clear from the course of the traffic thereafter. Between 1869 and 1870 there was a considerable increase in the anthracite tonnage, but between 1870 and 1871 almost a corresponding drop,

and the tonnage came back again to a little over 3,800,000 in 1872. It was at this time that the first acquisition of the stock in the Luzerne Coal & Iron Company, in 1872 in the Green Land Company, took place, yet let us notice the course of the traffic:

1870	3,608,586 tons
1871	2,781,509 tons
1872	3,850,118 tons
1873	4,144,340 tons
1874	4,150,660 tons
1875	3,277,527 tons
1876	3,951,513 tons
1877	4,362,124 tons
1878	3,446,616 tons
1879	4,361,785 tons
1880	4,606,415 tons

and so on down the table. Certainly here is nothing more than normal increase of traffic, due, first, to the development of the mining regions, and, secondly, to the natural growth of the communities which the railroad reached. But what are the competitors of the Lehigh Valley Railroad carrying at the end of this period? Railroad Exhibit 56 (R., 2308) gives the relative percentages carried by the different originating lines.* At the end of the year mentioned, *i. e.*, 1896, the Lehigh Valley Railroad Company had carried but 15.63 per cent. of all the anthracite traffic carried by the lines reaching the coal regions, and the percentage so continued in the

*The tonnage figures in this statement will not correspond with those in Exhibit 57 because they are made up on a different basis, *i. e.*, they exclude trackage coal and railroad supply coal, and after 1891 Exhibit 57 is on a net ton basis, whereas Exhibit 56 is on a gross ton basis, but the proportionate percentages is the point.

neighborhood of 16 per cent. from that time until after the acquisition of the Delaware, Susquehanna & Schuylkill Railroad Company in 1905, when the small volume of tonnage which had been carried by that line, *i. e.*, about 2½ per cent. of the total traffic from the regions, was included under the Lehigh Valley Railroad percentage, bringing it up for 1906 to 17.9 per cent., and from that point on it runs in:

1907	17.18%
1908	16.66%
1909	16.61%
1910	17.25%
1911	18.02%
1912	18.54%
1913	18.84%

The desirability of the Lehigh Valley Railroad's becoming a through trunk line has been referred to. As has been seen above, the advisability of developing the merchandise business of the Company was referred to in its annual report for 1893, and in that year the Company purchased from the Lehigh Valley Freight Company the equipment with which the merchandise business had been conducted up to that time. The development of the anthracite regions and the securing of the traffic had, in the minds of the management, been so important a consideration of the Company that the merchandise business had been farmed out to a distinct and separate concern, known as the Lehigh Valley Freight Company, and in which the Lehigh Valley Railroad Company had no financial interest (R., 1153, 1154 and 1185), but the vagaries of the coal traffic had been seen. Between 1863 and 1893 there had been a general increase in the gross revenue from the transportation of anthracite, but its stability was

wholly uncertain. It was about four and a half million dollars in 1870 and dropped to nearly three and a half million dollars in 1871. It was five million in 1876, and dropped over a million dollars between that and 1877. It was nearly seven million and a half in 1883, and dropped to six million in 1885, and dropped off nearly another half million in 1886. Included in a portion of this revenue is the revenue from the transportation of bituminous, but that traffic had shown a satisfactory increase from the beginning.—Railroad Exhibit 57 (R., 2309). Another factor was the well-recognized one that the anthracite regions were by no means inexhaustible. Certainly the opinions about the life of the anthracite mines have a better foundation than they had in 1895, and at that time it may well have been believed that a hundred years or less would see the end of anthracite transportation, and if the railroad were not in a position to command a portion of the merchandise traffic in eastern territory, the investment of its stockholders would some day be next to lost. The opinion of the Interstate Commerce Commission in the Meeker Case—Government Exhibit 64, at Record 745—has this to say on the point of the exhaustion of the mines:

> "We have noted the estimate of defendant's witnesses, to the effect that shipments of anthracite coal over the railroad will practically cease in fifty years, and we have quoted the opinion expressed on the same subject by the Anthracite Coal Strike Commission, to the effect that the production may last for two hundred and fifty years. Probably the truth lies somewhere between the two extremes."

Just where it does lie, of course, is a matter of opinion, but the day will be reached, and that day

will be a grievous one for the Lehigh Valley Railroad system if its net revenue from the transportation of other freight has not become sufficient to pay the interest on its bonds and a fair return on its stock. This factor alone seems enough to answer a charge that since the Railroad Company has acquired the stocks of coal companies it has developed its lines and transportation with the idea of restraining trade in anthracite or monopolizing the production and transportation or sale thereof.

The communities on the gathering lines of the Lehigh Valley in the Lehigh region are essentially mining communities, by which is meant that they are villages where the families of the miners live, and the only other business of the communities is that of supplying the needs of those miners. Already some of those communities have ceased to exist.

In this connection the testimony of Mr. Gildroy, Superintendent of the Mahanoy and Hazleton Division, which traverses the Lehigh coal region, was as follows (R., 1426):

> "Q. Are you the man that actually runs the M. & H. Division of the Lehigh Valley Railroad? A. Yes, sir.
>
> "Q. You are the boss and you run it? A. I might be so called.
>
> "Q. Have you got anything to do with mining business? A. No, sir.
>
> "Q. Ever had? A. No, sir.
>
> "Q. Tell us in your own language in reply to Mr. Machen's question about the possibility of some of these tracks being used for some other use, some day, just what kind of country it is that you work the railroad in up there? A. It is a mountainous country, some few towns in there which are practically built up on account of the mining purposes. With

few exceptions that is all there is. Take Hazleton, for instance, there are some little industries there, and, we think that a single track would take care of all the business as there is nothing there except the homes of the miners and nothing growing except huckleberries.

"Q. Is it a barren and wild and desolate country, which is practically uninhabited except by the people engaged either directly or indirectly, only in the employ of the different coal companies as miners or breaker employees, or else working for the railroad that carries the coal? A. Practically, yes, except the small business houses or stores that are connected with the town.

"Q. Where the miners and employees buy their supplies and edibles? A. Yes.

"Q. Any trees on it? A. Very few.

"Q. Any grass? A. Very little.

"Q. People up there hardly ever see grass, do they? A. There is no grass in my yard.

"Q. Aren't there points on your division where mining has been actually abandoned and when the mine died the whole town died with it? A. Yes.

"Q. And the people moved away and the houses stood there idle and desolate ever afterward? A. Yes.

"Q. Can you name a few?? A. Yes. I will take—Silverbrook, which was quite a town, and I don't know how many houses there were. It was quite a large town; had a telegraph office, post office and telephones. I think there are two or three houses up there now. The tracks are torn up.

"By Mr. Machen: How many miles of track have been torn up in your division in the last ten years account of the exhaustion of coal? A. I have never figured that, but there is quite a number of small branches.

"Mr. Boles: I will admit there have been very few mines exhausted so far.

"The Witness: We have taken up quite a lot of little pieces of track.

"RE-CROSS EXAMINATION BY MR. MACHEN:

"Q. A mile or so of track? A. Oh, no. One branch was over three miles in length."

In the Meeker Case the Interstate Commerce Commission (R., 743) refers to the fact that only a fraction more than eight miles of track of the Lehigh Valley Railroad had been abandoned in the Wyoming region, on account of the exhaustion of mines. It is true and admitted that there has been very little trackage abandoned on that account up to this day, and that is only natural, because up to the present very few mines have been exhausted. There are in the anhtracite regions 283 collieries and 778 mines in operation—Report of the Mining Department of Pennsylvania, 1912 (R., 1448). Of those collieries, 52 are located on the lines of the Lehigh Valley Railroad—Railroad Exhibit 54 (R., 2305). It may be that those collieries will continue longest in existence of any in the regions, or the mines connected therewith may be the first to be exhausted, but when the day does come the Superintendent of the lines of the railroad in the Lehigh region, known as the Mahanoy and Hazleton Divison, gave an estimate that more than half of the trackage in his division would be useless and could be lifted—Railroad Exhibit 76 (R., 2349). Including many tracks and sidings, there is in his division 429.91 miles, of which ultimately 216.45 will certainly become useless, and, considering the fact that the communities on these lines are made up of the miners and their families who work in the mines, it is reasonable to say that many of them will disappear, and that a still larger amount of trackage will be useless. A corresponding esti-

mate for the Wyoming Division of the Railroad cannot be made because that division embraces the main line of the Lehigh Valley between Penn Haven Junction and the New York State line, but the Superintendent thereof estimated that 33½ miles of branch tracks or colliery tracks will be worthless upon the exhaustion of the mines connected therewith—Railroad Exhibit 78 (R., 2352). That element was also one which inspired the motive to extend the Lehigh Valley Railroad to tidewater and New York and north to Buffalo in the first step to relieve it as far as possible of the total dependence it had found itself to have on the transportation of anthracite coal.

The results of this policy, begun about 1893, as heretofore shown, are reflected in Railroad Exhibit 60 (R., 2313), showing the constant and enormous increase in "other freight" from that year to 1913, compared with the proportionately smaller increase in, and exceedingly variable anthracite traffic during the same period.

5. *The inapplicability of Article 17 of the Constitution of Pennsylvania.*

In its confusion in attempting to answer the defense of the Lehigh Valley Railroad that it owns the stock of three coal companies, which, in turn, own a small percentage of the coal lands in Pennsylvania, for the reasons above set forth, and by reason of the encouragement and, we might say, the desire of the Commonwealth of Pennsylvania that such relationship should exist, the Government has brought forth Article 17 of the Constitution of Pennsylvania as it went into effect January 1st, 1874. Just what relation the Constitu-

tion of Pennsylvania has to the Sherman Act, counsel for the Government has not shown, but no matter. Let us assume that he is a citizen of the State of Pennsylvania and that his interest in civic affairs leads him to call upon the Lehigh Valley Railroad Company for a justification of the ownership of that stock. Page 17 of the Petition quotes Section 5 of Article 17 of the Constitution of Pennsylvania as follows: "No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or *engage in mining* or manufacturing articles for transportation over its works," and then the Petition says thereafter, notwithstanding this prohibition, the Lehigh Valley Railroad continued to acquire anthracite coal bearing lands and to extend its control over the production, sale and transportation of anthracite through the instrumentality of corporations in theory separate from itself but in fact completely dominated by it through stock ownership (R., Vol. V, p. 13). Now, what are the facts?

(a) *The charter right to mine coal.*

Through the authorized merger of the Beaver Meadow Railroad & Coal Company in 1864 and of the Hazleton Railroad Company in 1868, both of which companies were incorporated jointly as mining and transportation companies, the Lehigh Valley Railroad, with the full approval of the State of Pennsylvania, came into possession of a body of coal lands. We have shown already that none of those lands had been developed by the Companies themselves, but had been leased out for development; one to the Cross Creek Coal Company, the predecessor of Coxe Bros. & Co., Inc., and the other to A. Pardee & Company. Here was

an inviolable charter right existing in the Lehigh Valley Railroad Company to mine coal, but what happened? When the leases expired the remainder of the coal was turned over in fee and unconditionally to a new company, called the Hazleton Coal Company, and by merger later came into the full possession and control of the Lehigh Valley Coal Company—Railroad Exhibit 97 (R., 2441). There is clear evidence of a positive step by the Railroad Company not to engage in the mining of coal, irrespective of its charter right to do so.

As to any other lands, the testimony of Mr. David G. Baird, the Secretary of the Lehigh Valley Railroad Company, and in its employ since 1873 in various official capacities, was as follows (R.,1135):

> "Q. The Petition on page 18 states that thereafter—that is, after 1874—Lehigh Valley Railroad Company continued to acquire anthracite coal bearing lands, is that true? A. It is not.
>
> "Q. Has the Lehigh Valley Railroad Company ever acquired a single acre or a single foot, square foot, of coal lands since 1874? A. Not to my knowledge.
>
> "Q. Would you know if it had? A. I think I would.
>
> "Q. Would the records of the acquisition be in your office? A. They probably would."

Later Mr. Baird says on cross-examination by Mr. Machen (R., 1143-1145):

> "Q. Now, Mr. Baird, did I understand you to say in your direct-examination that the Lehigh Valley Railroad Company had never, in its own corporate capacity, acquired any other coal lands than those derived from the Beaver Meadow Railroad Company, and from the Hazleton Coal or Railroad Company? A. That is my understanding.

"Q. I would like to call your attention to the following passage from the Annual Report of the Lehigh Valley Railroad Company for the year 1871, which has been offered in evidence together with other extracts from the Annual Reports, marked Government Exhibit No. 107: 'In accordance with the policy heretofore approved, we have continued to acquire interests in coal lands situated in our various regions.' A. And the question?

"Q. I asked you if that statement is true or incorrect.

"Mr. Boles: What is the year of the report?

"Mr. Machen: 1871.

"The Witness: I suppose it may be said that the statement in the Annual Report in a general way, is correct; in a particular way it is not.

"Q. Please explain a little more in detail what you mean. A. I don't think you will find in that year that the railroad company took title or ever took title to any coal lands.

"Q. Do you think that those coal lands were acquired in the name of some subsidiary company? A. I do, or some individual.

"Q. In trust for the railroad company? A. I don't say so.

"Q. Well, you mean to say that the legal title was not vested in the railroad? A. That is what I mean to say.

"Q. Then I call your attention to the following passage from the Annual Report of the Lehigh Valley Railroad Company for the year ending November 30th, 1872, also included in Government Exhibit No. 107: 'Our interests in coal lands have been increased during the year by the purchase of the tract known as the Delano lands, comprising 5,800 acres, situated in Schuykill County, near Mahanoy City.' A. The Lehigh Valley Railroad never owned the Delano lands.

"Q. That statement then is incorrect, is it?

A. In a particular way it is; in a general way it may be said to be correct.

"Q. What do you mean by that? A. I mean, as I stated before, that the Lehigh Valley Railroad Company never took title to the Delano lands—legal title.

"Q. They covered it up by transferring to some individual? A. They transferred to nobody; they took title to nothing there.

"Q. They paid the money, didn't they? A. *They were the instruments for raising the money, yes.*

"Q. Was title to these lands taken in the name of any corporation or the name of some individual, and if so, what individual? A. The title to those lands was taken in the name of the Delano Land Company, a corporation created under a special charter.

"Q. Did the Lehigh Valley Railroad Company own the entire capital stock of the Delano Land Company? A. Yes, sir.

"Q. From the time of its incorporation? A. Yes, sir.

"Q. Well, now, Mr. Baird, are you sure you have that right? Because the passage which I read you is from the Annual Report for the year ending November, 1872, and according to a statement which has been furnished me, the Lehigh Valley Railroad Company first acquired stock in the Delano Land Company in the year 1873. Do you know anything about that? A. Off-hand I cannot answer that question or point out why there should be a difference of a few months there; it is probably accounted for in the bookkeeping. If my memory serves me right the Delano Land Company was incorporated in 1872.

"Q. Then the annual report for 1872 stated that 'Our interests in coal lands have been increased during the year by the purchase of the tract known as the Delano lands,' what was meant was that the interest of the railroad company in such lands had been increased by tak-

ing the title in the name of the Delano Land Company? A. I would not put it that way at all.

"Q. Now, I have stated the facts, haven't I? A. The Lehigh Valley Railroad Company was the owner of the entire capital stock of the Delano Land Company, and the Delano Land Company took title to the lands.

"Q. Yes, and that was what was meant by the statement in the annual report? A. I have no doubt that was what was meant.

"Q. Now, as to the lands 'purchased by us' referred to in the annual report for the year 1871, you don't know whether title to those lands was taken in the name of an individual or in the name of some other corporation? A. No, sir, because I don't know now what they were."

Both the extracts referred to above by counsel for the Government were from annual reports prior to 1874, and it is clear from the testimony of Mr. Baird here and the documents heretofore referred to that the expression "interests in coal lands" meant the purchase of stock in a few minor coal companies, viz.: A portion of the stock of the Coal Ridge Improvement & Coal Company, a portion of the stock of the Locust Mountain Coal & Iron Company, and the stock of the Delano Land Company, all of which purchases were referred to in the minutes of the Company as being made to protect the Company's anthracite traffic.

(b) *The ownership of the coal companies' stocks.*

To what extent does this clause of the Constitution of Pennsylvania apply to the ownership of the coal stock? This clause in the Constitution has been in effect for forty years, and during that time the officials of the State of Pennsylvania have been

thoroughly cognizant of the stock possessions of the Lehigh Valley Railroad and of the actions and affairs of the Coal Companies, through the numerous reports rendered from year to year to its Auditor General. But there is not a hint or a suggestion that the State has as much as questioned the ownership of that stock by the Lehigh Valley Railroad. And why?

During the debate in the Constitutional Convention incident to the adoption of this section (Volume 3, p. 470), George M. Dallas, later a Judge in the Circuit Court of the United States, presented in the Convention a resolution requesting the Committee on Railroads and Canals to make a separate report as to how far they supposed their amendment when reported, which is the language of the present Constitution, would be applicable to existing corporations. The resolution was referred to the Committee on Railroads and Canals, which Committee asked to be relieved of its consideration, whereupon it was referred to the Committee on the Judiciary, by which latter Committee it was also refused consideration, and thus the Convention was without any report on that very important subject, which, as Mr. Dallas said, would have influenced many in voting upon the section in question. Referring to the Dartmouth College Case, Mr. Dallas further said: "There are a great number of gentlemen in this body who are not lawyers at all, and it is fair to them that this point should be settled for them or made possible of settlement by them, and several of them have asked 'How far is it true that none of these amendments can be made to apply to existing corporations?'" Since that time the courts of Pennsylvania have dissolved any doubt that may have followed the adoption of the section

in question. In the case of *Hays* vs. *The Commonwealth*, 82 Pennsylvania 518 (1876), the Court says at page 524: "Charters of private corporations are left exactly as the new Constitution found them, and so they must remain until the company holding them shall enter into a new contract with the State by accepting the benefit of some future legislation." Moreover, Judge Dallas was one of the Judges who sat in the Circuit Court for the Eastern District of Pennsylvania in the Commodities Clause Case and rendered a concurring opinion. One of the important points urged in that case was the legislative authority conferred by the State of Pennsylvania upon the defendant carriers to purchase the stock of coal mining companies, and Judge Dallas, who, as has been seen, was a member of the Constitutional Convention, which formulated the Constitution of Pennsylvania in 1874, said in 1908 in the Commodities Clause Case, thirty-four years after the adoption of that Constitution:

> "Yet we are confronted in these cases with an attempt to subvert by Congressional edict the right to use and enjoy property of the utmost value which was acquired and *has long been held under State law of unquestionable validity, etc.*" (164 Fed. 250).

The charter of the Lehigh Valley Railroad Company had, since 1868, expressly conferred upon it the right to buy the stocks of coal companies. In the case of *Hartwell* vs. *Buffalo, Rochester & Pittsburgh Railway Company*, 6 Dist. Reps. 212 (1897), at page 215, the Secretary of Internal Affairs of the Commonwealth of Pennsylvania, upon an application for a *quo warranto*, announced the following opinion:

> "No allegations as to facts or conditions are made in the complaint, beyond those above re-

ferred to, and as no evidence has been offered, either in support of the allegations in the complaint or to show additional facts for consideration, the only questions for determination are the following: Do the laws of Pennsylvania authorize the Buffalo, Rochester & Pittsburgh Railway Company to own the capital stock, or any part thereof, of the Rochester and Pittsburgh Coal and Iron Company? And, if so, does such ownership constitute a violation of the Constitution of Pennsylvania?"

"These questions have been substantially determined by the Supreme Court of Pennsylvania in the adjudications found in the exhaustive opinion delivered in the case of the Com. *v.* The New York, Lake Erie and West. R. R. Co., reported in 132 Pa., 591. The doctrine there declared must be conclusive as to the contention in this case, unless there shall be a reversal of the judgment of the Supreme Court on the law as affecting the matters at issue.

"In the case referred to, the New York, Lake Erie and Western Railroad Company was a corporation chartered in a similar manner to that of the Buffalo, Rochester and Pittsburgh Company. It was the owner of the stock, or a large portion thereof, of the Northwestern Mining and Exchange Company, a corporation organized under the laws of Pennsylvania in the same manner the Rochester and Pittsburgh Coal & Iron Company was organized. The relations, therefore, between the railroad company and the mining company are substantially the same in both cases. From the opinion delivered and by the laws cited, it is seen that railroad and canal corporations were authorized by law to invest their moneys in the stocks and bonds of mining corporations, and such authority was given for the encouragement of the mining industry of the Commonwealth, assuming that individual enterprise would be unable to develop the mining industry of the State as rapidly as the needs of commerce re-

quired. The Act approved April 15, 1869, P. L., 31, gives a clear expression of the intent of the legislature, as disclosed in the following paragraph:

"'That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests in this Commonwealth by the purchase of their capital stock and bonds, or either of them, by the guarantee of or agreement to purchase the principal and interest, or either, of such bonds.'

"It is not necessary to search further to find the authority which railroad corporations enjoyed with reference to the purchase of stocks and bonds of mining companies, for this reference alone is sufficient to show that such purchase of stocks and bonds is entirely within the legislative authority given, and cannot by any means be construed as *ultra vires*.

"It is true, the contention in those proceedings was to effect an escheat of the lands held by the mining company, the stock of which in its entirety was held by the common carrier. The holding of this stock was alleged to be a violation of the Act of 1855, which prohibited railway companies from owning and controlling lands other than those necessary for conducting the business of transportation; but it was declared by Judge Paxson that holding or owning of the stock of the mining company by the common carrier did not constitute an ownership by the common carrier of the land, the title to which was held by the mining corporation, and only gave the common carrier the control of the *use* of lands so held by the mining company.

"The contention in this case, however, is with reference to the violation of section 5, art. XVII, of the constitution, which reads as follows: 'No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or

manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of a common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business.'

"If the holding or owning of the stock of a mining company by a common carrier does not violate the Act of 1855, with reference to acquiring or ownership of real estate, how then does the ownership of the stock of the Rochester and Pittsburgh Coal and Iron Company by the Buffalo, Rochester and Pittsburgh Railway Company constitute a violation of sec. 5, art. XVII, of the constitution, above recited? Certainly the legal sequence from the doctrine enunciated in the opinion of Judge Paxson in the case cited is that the ownership of the stock of the mining company by the Buffalo, Rochester and Pittsburgh Railway Company is not prosecuting or engaging in the mining industry within the meaning of section 5, art. XVII, of the constitution. The logic of Judge Paxson's opinion points to no other conclusion.

"In view of the adjudication of the question involved in this complaint in the doctrine enunciated by the highest tribunal of the State, this department declines to certify this case to the attorney-general for his action."

It is clear, therefore, that the courts and officials of the Commonwealth of Pennsylvania have construed the language of the Constitution of the State not only in accordance with the well-recognized principles of law which applied thereto, but as well according to the plain meaning and intent of the language itself, which says that a carrier shall not, "directly or indirectly, prosecute or engage in mining." Now, the courts and officials of the State of Pennsylvania have said that the owner-

ship of stock does not mean that the owning company is engaged, directly or indirectly, in mining, and the officials of the Commonwealth have long been closely familiar with the affairs of these defendants and, the above provision of the Constitution having been in effect for forty years, it seems clear that the State of Pennsylvania believes that the ownership by the Lehigh Valley Railroad of the stocks herein questioned has not resulted in any commingling of affairs, or obliteration of corporate distinctions, thereby bringing the Railroad under the charge of indirectly engaging in mining. See *Commonwealth* vs. *Monongahela Co.*, 216 Pa., 108 (1906).

In the Court below in this proceeding, Hough, *J.*, made the following affirmative finding:

> "(9) The mere creation, maintenance, and extension of the composite business of owning, mining, transporting, and selling coal has long been not only legal but laudable within the state of Pennsylvania—and is so still"* (225 Fed. 399, 404).

Excellent evidence of the attitude of the State of Pennsylvania in respect of the stock relationships between its anthracite coal mining companies and its railroads in the anthracite regions, is found in the ownership of the Delaware, Schuylkill & Susquehanna Railroad Company by the stockholders of Coxe Bros. & Company, Inc. The Delaware, Susquehanna & Schuylkill Railroad Company was incorporated in 1890, with the authority to construct a railroad in Luzerne, Carbon and Schuylkill Counties, in the State of Pennsylvania—Rail-

*"NOTE.—This proposition is rested without further discussion on the statement of *Gray, J.*, in (C. C.) 164 Fed. 224, as quoted in 213 U. S. 402, 29 Sup. Ct. 527, 53 L. Ed. 836. It might have been made after an examination of the testimony in this case."

road Exhibit 15 (R., 2128). The sixth section of its charter says that the affairs of the company shall be controlled by a President and a Board of six Directors, and the names of those who should manage its affairs for the first year were given as follows: Eckley B. Coxe, President; and Eckley B. Coxe, Alexander B. Coxe, E. B. Ely, Arthur McClellan, J. Brinton White and Henry B. Coxe, Directors. In 1905, when the Lehigh Valley Railroad Company purchased the stock of those two companies, Irving A. Stearns was the President of the Delaware, Susquehanna & Schuylkill Railroad Company, J. Brinton White was the Treasurer, and those two gentlemen were respectively the Vice-President and Treasurer of Coxe Bros. & Company, Inc. They held the same positions in both companies in 1901. Each Company had seven stockholders. The stockholders of the Delaware, Susquehanna & Schuylkill Railroad Company in November, 1905, were the Estate of Eckley B. Coxe, deceased, Alexander B. Coxe, Estate of Henry B. Coxe, deceased, Eckley B. Coxe, Jr., Estate of E. B. Ely, deceased; exactly the same as the stockholders of Coxe Bros. & Company, Inc. (R., 1126).

6. Minor purchases of stock.

In several instances since the Acts of 1868 and 1869 the Railroad Company has acquired the stocks of small coal companies, which stocks have subsequently been transferred to the Lehigh Valley Coal Company.

Between 1868 and 1880 it had acquired at dif-

ferent times all the capital stock of the following companies (Government Exhibit 103, R., 883):

Coal Ridge Improvement & Coal Co..	$802,550.
Delano Land Company.....	350,000.
Franklin Coal Company.....	119,800.
Green Land Company.....	50,000.
Highland Coal Company.....	120,000.
Humbolt Coal Company.....	415,000.
*Lehigh Valley Coal Company.....	650,000.
Locust Mountain Coal & Iron Co....	764,600.
Luzerne Coal & Iron Co.....	600,000.
Mineral Spring Coal Company.....	195,900.
New York and Middle Coal Field Railroad and Coal Co.....	1,058,650.

As has been noted heretofore, two of these companies, the Luzerne Coal & Iron Company and the Green Land Company, were consolidated in 1872, and the name thereof changed to Lehigh Valley Coal Company in 1875, but to say that the acquisition of the other stocks above mentioned were made for the purpose of enabling the said Lehigh Valley Coal Company to monopolize the production of anthracite coal is refuted at once by an examination of Railroad Exhibit 69 (R., 2334) and the Government's own Exhibit 103 (R., 889), because of the other companies above mentioned, the stock of the said companies were held by the Railroad Company until the following respective dates:

Coal Ridge Improvement & Coal Co..	1905
Delano Land Company.....	1891
Franklin Coal Company.....	1891
Highland Coal Company.....	Still held
Humbolt Coal Company.....	1891

*As much as had been issued up to 1880.

Locust Mountain Coal & Iron Co.... (Part of the stock had been disposed of prior to that date, but none was sold to the Lehigh Valley Coal Company until 1911)	1911
Mineral Spring Coal Company.....	1905
New York and Middle Coal Field Railroad and Coal Company....	Still held

In other words, not until nearly twenty years after the organization of the Lehigh Valley Coal Company was any stock of any subsidiary company transferred to it. And then why? The Coal Company owned a certain amount of land and underneath of it was a certain amount of coal. Each year, since 1872, the Lehigh Valley Coal Company had been mining anthracite, millions of tons a year. Government Exhibit 107 (R., 923) shows that the Lehigh Valley Coal Company was mining each year from its own land in the neighborhood of a million and a half tons. In 1894 it mined from its own mines over 2,000,000 tons and in 1895 2,619,960 (R., 927). Indeed more than that, because that only represents the tons shipped and not the tonnage consumed in the operation of the mines. With everything going out and nothing to replenish the supply it was obvious that it was only a question of time when the Lehigh Valley Coal Company would find itself a hollow shell. Replenishment of its source of supply became necessary (R., 1613). In this connection, see *People* vs. *Stevens*, 197 N. Y., 1, 7 (1909). Therefore, in 1891, the stock of three companies was transferred to the Lehigh Valley Coal Company that they might add the lands of those companies to their source of sup-

ply, namely, the Delano Land Company, the Frankling Coal Company, and the Humbolt Coal Company.

After the acquisition of the above named companies by the Lehigh Valley Railroad Company the following acquisitions took place:

1884: A small portion of the stock of the Wyoming Valley Coal Company;

1892: Virtually all of the remaining stock of the Wyoming Valley Coal Company; and the stock of the Westwood Coal Company, into which was merged the Coal Ridge Improvement & Coal Company, above mentioned;

1897: The Hazleton Coal Company;

1901: The Seneca Coal Company; and the Connell Coal Company;

1902: Righter Coal Company;

1905. Wyoming Coal and Land Company; and the Warriour Run Mining Company.

All of the companies acquired in this second period (and all of them together owned an insignificant acreage relative to the total mining regions) were held by the Lehigh Valley Railroad Company until 1905, and as their lands were contiguous to the Lehigh Valley Railroad, as well as to the Lehigh Valley Coal Company, the stocks of those companies were transferred to the Coal Company, because in every year the Lehigh Valley Coal Company had been mining from its then possessions several million tons of coal, its production in 1900 having been over 3,000,000; in 1901, nearly 4,000,000 tons; in 1902, the year of the large strike, 2,500,000 tons; in 1903, 5,000,000 tons; in 1904, nearly 5,000,000 tons, and in 1905 nearly 6,000,000 tons (Railroad Exhibit 62, R., 2315).

One of those companies, the Hazleton Coal Company, possessed no other lands anyway than those which it had secured from the Lehigh Valley Railroad Company, which were the old Beaver Meadow and Hazleton Lands acquired by the Railroad Company at the time of the merger of the Beaver Meadow Railroad and the Hazleton Railroad Company.

If it be said that, irrespective of the reason why the Railroad Company acquired the stock of these minor coal companies, which was to protect its tonnage,—a matter vital to the very existence of the Railroad Company—or irrespective of the reason why, many years after their acquisition, they were transferred to the Lehigh Valley Coal Company,—a matter really vital to the existence of that company—nevertheless the transactions were wrong because an unlawful result came about, then let us see if there was an unlawful result.

(*a*) As to production of coal.

At the present time the Lehigh Valley Coal Company owns or controls but 10.3 per cent. of the total anthracite coal acreage in the three contiguous regions in Pennsylvania,—the Wyoming, Lehigh and Schuylkill, and but 22.3 per cent. of the acreage naturally and conveniently tributary to the Lehigh Valley Railroad Company (Coal Company Exhibit 7, R., 2653). That is not monopoly, no matter what theory may be adopted as to the meaning of that word. *United States* v. *Patten*, 226 U. S., 525, says that monopoly is "all or the dominant portion of a commodity." Nor was there ever a restraint of trade involved in the acquisition of those companies, because there has been neither allegation nor proof that any of them was ever a competitor of

the Lehigh Valley Coal Company or of its predecessors, with the exception of the allegations in the Petition, page 22f (R., Vol. V, p. 15), in respect of the Connell Coal Co., the Seneca Coal Company, Mineral Spring Coal Company, Righter Coal Company, Warriour Run Mining Company and Wyoming Coal and Land Company. One of those Companies, the Connell, had merely mined coal from the lands leased to it by the Lehigh Valley Coal Co. in any event. The Petition alleged that those companies, prior to their acquisition by the Lehigh Valley Railroad, mined and sold anthracite in interstate commerce in competition with the Lehigh Valley Coal Company, which allegation was denied in the Answer of the Railroad Company, pages 24 and 25, and there was not the slightest attempt made by the Government to prove their allegations. The general charge of restraint of trade and monopoly against the defendants in this case has been dealt with fully earlier in this Brief.

(*b*) As to transportation.

When the Government alleges that the stock of those coal companies were acquired by the Railroad for the sake of protecting its anthracite tonnage we concede the point. If there is perpetual competition and no result then there is no commerce. If A bids against B for the acquisition of an article there is no commerce or no trade until A or B has made a successful bid and secures the article. Then an act of commerce takes place. The acquisition of the thing competed for is the intended result of competition, and what the Lehigh Valley Railroad Company did was *not to acquire its competitor but to acquire the thing competed for,* which is the essence of competition. The thing

condemned in the *Trans-Missouri Case*, 166 U. S., 290, the *Joint Traffic Association Case*, 171 U. S., 505, *Northern Securities Case*, 193 U. S., 197, the *Union Pacific Case*, 222 U. S., 541, 226 U. S., 61, 470, and *Lake Shore Case*, 203 Fed., 295, was the combination of the competitors or the acquisition by one party of his competitor or competitors, and not the acquisition of the thing they competed for by a process of normal and lawfully sanctioned means.

Moreover, the extensions of the Railroad, first south along the Lehigh River, then eastwardly across New Jersey to tidewater, and then northwardly and westwardly into New York State fostered and aided competition and took the coal which it carried, first, into new places, and secondly, into cities and towns reached previously by its competitors, and thirdly, to connecting railroads that had not been reached before, and that was an aid to commerce, trade and competition.

(*c*) As to the sale of the coal.

As has been shown above, the Petition alleged that of the above companies, the Connell Coal Company, the Seneca Coal Company, the Mineral Spring Coal Company, the Righter Coal Company, the Warriour Run Mining Company and the Wyoming Coal and Land Co. mined and sold coal in interstate commerce in competition with the Lehigh Valley Coal Company, but that allegation was denied and the Government made no attempt to prove it. But in any event the production of those companies, as the Petition itself shows, was so small that their acquisition could have had no appreciable effect upon trade and commerce in anthracite coal. But the Government's own proof shows that there was no thought of sup-

pressing competition, and that the stocks of those companies were acquired to protect the tonnage of the Railroad. After the stocks were acquired by the Railroad Company neither those companies nor any of the others ceased mining coal; they continued to produce and they continued to sell, and even after the stocks of the companies were turned over to the Lehigh Valley Coal Company no ill result could possibly have followed to the communities buying anthracite. And the reason is this: a reference to the map of the Lehigh Valley Railroad Company (Government Exhibit 24, R., 627) and a reference to the map of all the railroads in trunk line territory (Railroad Exhibit 34, R., 2278), will show the numerous points at which the Lehigh Valley Railroad competes with other lines which originate the haul of anthracite. Turning to Railroad Exhibit 56 (R., 2308) the anthracite tonnage will be found which was carried by the numerous competitors of the Lehigh Valley Railroad Company during the period from 1896 to 1913. These intersections with other railroads necessarily regulate the market at those points. If A at Phillipsburg has a coal yard adjacent to the Central Railroad of New Jersey, and B at Phillipsburg has a coal yard adjacent to the Lehigh Valley Railroad, A competes for B's customers and B competes for A's customers, and if the Lehigh Valley Coal Company, shipping over the Lehigh Valley Railroad, exacted a price from B which was higher than A had to pay for the coal he received over the Central Railroad of New Jersey, the stress of competition would dry B up and A would have the market to himself. Therefore, the prices that A paid governed the prices that B could pay and the shippers over the Lehigh Valley Railroad who sold to B, including the Lehigh Valley Coal Company, had

to be regulated by that competition. Not only this, but to many of the points several railroads carried coal, and the numerous shippers over each line came into competition with the numerous shippers over all the other lines. At the local points on the Lehigh Valley Railroad not reached by any other railroad competition was regulated by three factors. First, the competition which the Lehigh Valley Coal Company met from other producers at originating points on the Lehigh Valley Railroad. Secondly, the relations which naturally had to exist between the prices at those local points and the prices at the nearest points intersected by another railroad. Thirdly, the ability of any shipper on any line to ship his coal to such local points by demanding the establishment of joint rates, if none already existed, between the line adjacent to which he produced his coal and the Lehigh Valley Railroad, which carried it to the local point. As to the first factor, a reference to Railroad Exhibit 52 (R., 2301) and Railroad Exhibit 54 (R., 2305), shows the numerous other shippers of coal who shipped from collieries located on the line of the Lehigh Valley Railroad. With one exception every one of those shippers testified that he sold coal freely in competition at every point on the line of the Lehigh Valley Railroad and had long been doing so, applying his remarks both before March, 1912, when among the other producers, the Lehigh Valley Coal Company sold in the local markets, and after March, 1912, or since the Sales Company has been selling in the local markets (Testimony of H. C. Barr, Sales Manager for J. S. Wentz and Midvalley Coal Co., R., 2045; Wm. R. Coyle, Sales Manager for Weston Dodson & Co., Inc., which company sells the products of the Beaver Brook,

Morea and Weston collieries, R., 2017; Robert C. Hill, Vice-President, Madeira Hill & Co., R., 1944; Chas. H. Jacobs, member of the firm of Whitney & Kemmerer, R., 1713; Wilson Kishbaugh, General Sales Agent, Mill Creek Coal Co., R., 2034; Wm. R. McTurk, President and principal stockholder, Hazle Mountain Coal Co., R., 1845; and S. B. Thorne, member of the firm of Thorne, Neale & Co., R., 1865).

As to the factor of joint rates, Mr. Grier, General Coal and Freight Agent of the Railroad Company, testified that the policy of the Company had been against the establishment of joint rates, because the demand at strictly line points on the Lehigh Valley Railroad, or what we have called local points, was so much less than the supply, and there were so many shippers located at the originating points on the Lehigh Valley Railroad that the Railroad properly, from a traffic standpoint, believed that it should have the long haul on anthracite coal and, therefore, opposed joint rates. That is the natural and ordinary railroad practice and Mr. R. H. Large, Coal Freight Agent of the Pennsylvania Railroad (R., 1720), testified that the policy of that company in respect of bituminous coal was exactly the same, and for the same reasons, but it was different on his line in respect of anthracite, because the conditions were entirely different, the demand at the Pennsylvania Railroad line points far exceeding the supply originating on their lines. If any dealer in coal located at one of these local or line points felt that the competition for his trade among the producers in the mining regions on the Lehigh Valley Railroad was not satisfactory he had the privilege of going to the Interstate Commerce Commission

and that body had ample power, if it believed the facts justified it, to establish a joint rate between the Lehigh Valley Railroad and one of the other railroads which originated the haul of anthracite, so that the producer on the other railroad might freely ship his coal to the complainant. Of course a joint rate was not vital to the movement of the coal considered by itself, because two locals could have been used, but ordinarily they would have been higher taken together than a joint rate fixed by the Commission. Now the best proof of the fact that the dealers located at these line points were not dissatisfied with the competition for their trade among the producers located on the Lehigh Valley Railroad is the fact that not a single application was ever made to the Interstate Commerce Commission for the establishment of a joint rate between another originating line and the Lehigh Valley Railroad to a local point on the latter.

II. Purchase of the stock of Coxe Brothers & Co., Inc.

(a) *Reasons for purchase:*

As has been noted above, the financial condition of the Lehigh Valley Railroad Company, between 1893 and 1904 was a matter of grave anxiety to its officers. In September, 1903, a plan of finance was undertaken and a General Consolidated Mortgage made, embracing virtually all the possessions of the Company and providing for a total issue of $150,000,000 of bonds, part of which were to be used for refunding, part for new improvements and part to be issued on the security of the property theretofore unpledged. Under this Mortgage bonds had, prior to the purchase of Coxe Brothers & Co., Inc., been

certified by the trustee and delivered to the Railroad Company as follows (3 R., 1991):

1903: March	10	$4,000,000
	15	1,000,000
	16	1,000,000
	17	1,000,000
	21	1,000,000
	24	2,000,000
	29	1,500,000
April	3	1,500,000
	7	2,000,000
	28	3,100,000
May	2	2,000,000
		$20,100,000

The anthracite coal traffic of the Company had shown no material increase. Railroad Exhibit 60 (4 R., 2313) shows that it amounted to 7,500,000 tons in 1894; about 11,000,000 in 1895; dropped down to 9,000,000 tons in 1898; up again to 10,600,000 tons in 1899, but down to less than 7,000,000 tons in 1902 and also in 1903. If anything could have been disastrous to the Company just at the time it began to see light, it would have been the loss of another million tons of anthracite traffic. That very calamity threatened when Mr. Thomas received a visit from Mr. Alexander B. Coxe. In the old Reading Case Mr. Thomas testified in respect of this matter as follows:

> "Mr. Alexander B. Coxe was a member of the Board of the Lehigh Valley Railroad. He came to me some months prior to the purchase and said that he thought of getting out of the business; that he had had unexpectedly a large offer for that property but that, in view of his con-

nection with the road and his association with its owners, he would prefer to have them acquire it. He declined to name the men who had made him the offer. Subsequent interviews between us convinced me it was a *bona fide* offer. Mr. Coxe was a gentleman, a man of wealth and reputation and I had confidence in what he said. He made me the first offer. I went to our bankers and I asked them if I could have a certain amount of money without disclosing the purpose. They told me I could. The result was that I negotiated the transaction, notified our people of what I had done and asked authority to go on and close the transaction, which I did. So far from disclosing it to anybody outside of our own finance committee, I took every pains to keep it quiet, for fear I would lose it.

"Q. And lose the tonnage? A. And lose the tonnage. The Pennsylvania Road was carrying then the greater part of that tonnage West. They made a demand for part of it, thought they ought to have it. They thought it was not a fair deal for us to go in and buy the properties they were carrying the coal of. I said that tonnage was on our line, and I proposed to have it, and I maintained that position. I would have preferred not to have bought that property. I would have preferred to let Mr. Coxe remain there and run it; but I was not going to expose myself to the possibility of losing a large tonnage" (1 R., 434).

That his action was ratified is shown by the extracts from the Minutes of the Meeting of the Executive Committee of the Railroad Company, held September 26, 1905 (Government Exhibit 19, 2 R., 616). In the present case Mr. L. D. Smith, Vice President of the Railroad Company, testified that he was familiar with the details in respect of the purchase of the stock of Coxe Brothers & Co., Inc.,

as he was Mr. Thomas' assistant at the time, and the various matters relating to the purchase came within his knowledge and supervision (3 R., 1236). Mr. Smith's testimony in this respect is so important that it should be quoted here at length:

> "Q. Who was the president of the company at the time of the purchase of the stock of Coxe Brothers & Company and the Delaware, Susquehanna & Schuylkill Railroad? A. E. B. Thomas.
>
> "Q. Were you his active assistant at that time? A. I was.
>
> "Q. Did the various matters relating to that purchase come within your knowledge and supervision? A. They did.
>
> "Q. Will you tell us how it came about that the Lehigh Valley Railroad Company purchased the stock of Coxe Brothers & Company? A. Mr. Alexander B. Coxe, who was the managing director of all the Coxe family affairs, and the Coxe Brothers & Company, Inc., came to our president, Mr. E. B. Thomas, and stated that their family had received an offer for the purchase of the entire capital stock of Coxe Brothers & Company, and such corporations as Coxe Brothers & Company owned. That they had been engaged in business for a great many years, that many of the original people had died, that they were rather inclined to consider an offer for the purchase of their property as they were desirous of getting out of active business, and that before they sold the property they wanted to talk with Mr. Thomas and offer the property to the Lehigh Valley Railroad Company, on the ground that they would prefer the Lehigh Valley Railroad Company's having it to any other party for a number of reasons. The first one being that Coxe Brothers & Company, Inc., as a corporation was mining a great deal of coal from lands which they leased from various members of the

old Coxe family and the Coxes stated that they wanted——

"Mr. Machen: Were you present at these negotiations?

"The Witness: At some of them, yes.

"Mr. Machen: You are speaking only about those at which you were present?

"The Witness: I cannot now recall all of the meetings at which I was present, but I was familiar with all these facts.

"Q. You were personally familiar with every detail of the transaction, were you not? A. Yes.

"Q. At the time? A. At the time. They wanted to see that the mining was prosecuted by whoever should buy Coxe Brothers & Company on a scientific and economical basis, so as to conserve the greatest possible amount of coal in the land rather than against a wasteful mining, which while yielding large profit at the moment, would in the long run not conduce to the best results either for themselves or for the owners of the land; that they considered that the Lehigh Valley interests had always prosecuted coal mining with due regard to the conservation of the greatest amount of coal in the land.

"Mr. Machen: I object to any hearsay testimony as to what they said as to what had been done or what they regarded might be done.

"Q. Proceed. A. Mr. Coxe further stated that he had always considered that Coxe Brothers' were naturally properties which if sold should come under the control of the Lehigh Valley interests, as they were adjacent or practically adjacent at all their points to the Lehigh Valley Railroad Company; that the Delaware, Susquehanna & Schuylkill Railroad, which they owned and which was entirely in the nature of an industrial road serving no

other purpose than to assemble the coal of the collieries——

"Mr. Machen: Is that what Coxe said or what you are now stating as your opinion?

"The Witness: It is a great deal of what Mr. Coxe said.

"Mr. Machen: If you are going to say what Mr. Coxe said at all, against my objection, please state what he said and segregate it.

"The Witness: I cannot repeat verbatim something which a man said nine years ago. It is the substance of what he said; it made a decided impression upon me that he should come down and talk the matter over the way he did; that he considered the Delaware, Susquehanna & Schuylkill road could only be used for the benefit of the Lehigh Valley Railroad as it did not reach any other railroad of consequence, if any road at all, and if we would meet the price which had been offered to them they would very much prefer because of their own interest in the matter, to sell the property to the Lehigh Valley Railroad Company.

"Q. By their own interest, you mean by that the fact that many of the members, or several of the members of the family, individually, owned large coal tracts? A. Exactly.

"Q. Which were under lease to Coxe Brothers & Company for mining? A. Exactly.

"Q. And whoever took over the stock of Coxe Brothers would have to continue the mining of the individual tracts belonging to the members of the Coxe family? A. That is the situation.

"Q. At that time did the Lehigh Valley Railroad Company have a large volume of traffic moving over its rails in the trains of the Delaware, Susquehanna & Schuylkill Railroad? A. It did.

"Q. At that time was the Lehigh Valley Railroad Company emerging from serious financial

straits? A. It was slowly emerging from very distressing financial straits.

"Q. And if at that critical period it had lost this valuable tonnage which had been moving over its rails in the trains of the Delaware, Susquehanna & Schuylkill Railroad would it or not have been a vital blow to the railroad company? A. It would have been a vital blow, more particularly though in view of the fact that we had just issued several millions of bonds under our General Consolidated Mortgage, which was in an untried market and untried expedient by the Lehigh Valley. The Lehigh Valley Railroad was simply in the position that it was not able previously to successfully sell any substantial issue of bonds.

"Q. Was it, therefore, a matter of great concern to the company when they found that Coxe Brothers & Company were in the market for the sale of their stock? A. It was a matter of such great concern that the president immediately assembled the Executive Committee and laid the matter before them, talked the matter over with me and said he didn't see how the Lehigh Valley Railroad under any circumstances whatever could afford to let the Coxe Brothers' properties fall into the hands of people who would divert the tonnage from its natural and normal outlet, viz., the Lehigh Valley Railroad.

"Q. And which had been the outlet for many years past? A. Always.

"Q. Was legal advice taken as to the validity of the purchase at the time? A. It was" (3 R., 1236, 1237, 1238, 1239).

In the year 1905 the production of coal by Coxe Brothers & Company, Inc., including fuel consumed at the mines, constituted 1,305,505 gross tons, or, eliminating the fuel consumed at the mines, it produced for shipment about 1,100,000 tons.

(b) *Separate management and control since purchase:*

Since the acquisition of the stock of Coxe Brothers & Company, Inc., by the Railroad Company, it has always continued to manage its own affairs and the Lehigh Valley Railroad Company has kept itself distinctly and absolutely apart from its management (3 R., 1240). Mr. Smith testified that Coxe Brothers & Company, Inc., has been just as free in the management and control of its properties as any shipper located along the line of the Lehigh Valley Railroad (3 R., 1241). Its production of coal since 1905 has increased each year, with the exception of a slight falling off in 1909. Railroad Exhibit 62 (4 R., 2315), shows that whereas the production in 1905 was 1,305,505 tons, in 1913 its production was the largest in the history of the Company, namely, 1,481,931 tons.

(c) *The trackage contract of 1894:*

The Annual Report of the Philadelphia & Reading Railroad Company, for November 30, 1893, stated in substance that a contract had been made with the Philadelphia & Reading by Coxe Brothers & Company, Inc., for the transportation over the Reading System of a large tonnage of coal from the mines of that company to New York tidewater and other markets, the minimum amount to be furnished for transportation to New York tidewater to be a million tons. It stated that in order to transport that coal under that contract the reading had built a railroad ten miles in length to connect its line with that of the Delaware, Susquehanna & Schuylkill Railroad controlled by Coxe Brothers & Co., Inc. (1 R., 503). The Report further states that the contract above mentioned between

the Reading and Coxe Brothers & Company, Inc., was not being carried out and that in consequence of a disagreement the transportation of Coxe Brothers' coal had been almost entirely lost to the Reading Company (1 R., 503). The Record shows that there had been this competition between the Reading and the Lehigh Valley Railroad for the transportation of the tonnage of Coxe Brothers & Company, Inc., for many years and that, so far as the eastbound shipments were concerned, it continued until a trackage contract was made by the Lehigh Valley Railroad Company, giving the Delaware, Susquehanna & Schuylkill Railroad Company, which, as shown above, was a railroad company incorporated, operated and owned entirely by the seven stockholders of Coxe Brothers & Company, Inc., the privilege of runing its own coal trains to Perth Amboy over the rails of the Lehigh Valley Railroad for a period of fifteen years from July 1, 1894. The Annual Report of the Lehigh Valley Railroad Company for 1894 stated that the result was to bring to the Railroad Company a large tonnage which had had several outlets and which had been in contention for sometime previously (2 R., 925). The contract is shown in full in Government Exhibit 11 (2 R., 591). It was made for the through transportation of coal and provided that it should not apply in respect of the carriage of any coal from the collieries then reached by the Lehigh Valley Railroad except the Hollywood and Lattimer (2 R., 600). And also provided that it should not permit transportation to any intermediate points. It was accompanied by a collateral contract between the Cross Creek Coal Company, the name of which, in 1900, was changed to Coxe Brothers & Co., Inc., which provided (2 R., 604)

"that the coal, the transportation of which was provided for in the trackage contract, was principally mined and to be mined by said Cross Creek Coal Company from its mines which are situated on or along the Railroad of the said Delaware, Susquehanna & Schuylkill Railroad Company and naturally tributary thereto" and providing that the Cross Creek Coal Company would ship over the rails of the Lehigh Valley Railroad in pursuance of this trackage contract not less than "one-third the total rail shipments from said mines and collieries" (2 R., 604).

(d) *Scarcity of competition in sale of coal prior to purchase of Coxe Bros. & Co., Inc., stock:*

The Petition of the Government in this case alleged that Coxe Brothers & Company, Inc., sold large quantities of coal prior to 1905 in competition with the Lehigh Valley Coal Company. It says that this averment has been admitted, but a reference to both the Answer of the Lehigh Valley Railroad Company (5 R., 88, 89) and of the Lehigh Valley Coal Company (5 R., 102) will dispel such assumption. The Government made no attempt to prove its allegation that Coxe Brothers and Company, Inc., and the Lehigh Valley Coal Company had been competitors. It is true that there might have been some small degree of competition between them at certain line points between Mauch Chunk and New York, as the record shows that the Delaware, Susquehanna & Schuylkill Railroad Company, which served the Coxe mines, had joint rates in effect with the Lehigh Valley to points east of Mauch Chunk, but there has not been any proof that any coal ever moved thereunder, nor it is likely, in view of the track-

age contract above referred to. If there was such competition at line points it was because the Lehigh Valley Railroad had virtually invited it against the Lehigh Valley Coal Company by establishing such joint rates with the Delaware, Susquehanna & Schuylkill Railroad.

Because of the contracts above mentioned, at least one-third, therefore, of the tonnage of Coxe Brothers & Co., Inc., was obligated to move to New York Harbor, but as a matter of fact a still larger proportion of its tonnage was moved via the Delaware, Susquehanna & Schuylkill Railroad trains to New York Harbor, indeed nearly all of it, because Railroad Exhibit 62 (4 R., 2315) shows that Coxe Brothers & Company, Inc., produced for shipping, as tabulated above, less than a million and a quarter tons. The Lattimer Colliery owned by Pardee Brothers & Co., Inc., and which connected with the Delaware, Susquehanna & Schuylkill Railroad, produces about a half million tons a year (Railroad Exhibit 54, 4 R., 2305), and a reference to Railroad Exhibit 56 (4 R., 2308) shows that these two figures, taken together, equal the total tonnage carried by the Delaware, Susquehanna & Schuylkill Railroad. No other railroad reached the collieries of Coxe Brothers & Co., Inc., and, therefore, as cross reference to the above exhibits will show, between 1896, at least, and 1905, practically the total tonnage of Coxe Brothers & Co., Inc., came to New York tide. There it came in competition with the coal moving via eight other railroads, and even on the assumption that it all came to New York (see 2 R., 732), it was but a small factor in the general competition. Another factor to be considered is that a large portion of the tonnage brought to tidewater at New York is trans-

shipped, either by boat or by rail, to New England points. How much of Coxe Brothers' coal may have gone into New England has not been shown. Therefore, the factor of competition between Coxe Brothers & Co. and the Lehigh Valley Coal Company in respect of the trade at New York Harbor and at points east through New England could not be considered to have been any element in the purchase of the stock of Coxe Brothers & Company by the Railroad Company, nor can the result have been in restraint of trade, even assuming that Coxe Brothers & Co., Inc., sold their total production at New York Harbor, which is far from likely, as it was so small a factor in the general competition at that point of sale, that the common ownership of the stock of the Company and the stock of the Lehigh Valley Coal Company coal could neither have regulated prices nor affected the flow of commerce. It must be remembered that Coxe Brothers & Co., Inc., sold their coal freely thereafter as they sold it before; that they increased their production constantly thereafter. It should also be noted that a portion of the coal mined by Coxe Brothers & Company, Inc., formerly the Cross Creek Coal Company, came from the Beaver Meadow lands, which once belonged to the Railroad and which subsequently came into the possession of the Lehigh Valley Coal Company through the Hazleton Coal Company (2 R., 975, and 3 R., 1136).

It is in evidence that what little coal went westbound from the Coxe Brothers mines was shipped via the Pennsylvania Railroad but to what points has not been shown, but in view of the western connections of that railroad it is totally improbable that it came into competition at any points with the western sales of the Lehigh Valley Coal Company.

The fact that there was no thought of suppressing competition or any intent or idea of monopolization, is clearly shown from the testimony of Mr. Thomas in the old Reading Case (1 R., 434), corroborated by Mr. Smith in the present case (3 R., 1275), to the effect that he would have preferred not to have bought the stock. "I would have preferred to let Mr. Coxe remain there and run it, but I was not going to expose myself to the possibility of losing a large tonnage." The protection of the traffic of the Railroad Company was the only motive. The Court below in this case found affirmatively that such and such only was the motive involved in the purchase, namely, "to get and firmly keep the business of carrying the coal extracted from those lands" (225 Fed. 403).

Another factor in the transaction was the coal owned individually by members of the Coxe family and on which they received royalties. Scientific methods of mining have a material effect upon royalties received and as has been shown, Mr. Coxe stated that one of the reasons why he would rather sell the stock of Coxe Brothers & Co., Inc., to the Lehigh Valley Railroad than to anybody else, provided he could get the same price, was because he assumed that the mining of the Coxe Brothers coal would be carried on in the same scientific manner it had been under his own supervision and as had always been pursued by the Lehigh Valley Coal Company. Mr. Parker, connected with the United States Geological Survey, has spoken in high terms of the scientific policy adopted by the Coxe family, mentioning particularly in that respect Mr. Eckley B. Coxe (4 R., 2406). Royalties have continued to be paid each year to the members of the Coxe family, in respect of coal mined by Coxe Brothers &

Company from their individual lands (1 R., 546, and Government Exhibit 128, 2 R., 1042).

(e) *Purchase justified as investment, aside from factor of vital necessity to protect traffic of the railroad:*

The Government has charged that too much was paid for the stock, that the investment has been unprofitable, and says it can be explained only on the ground that it was "to eliminate an uncontrolled interest". That the purchase price paid for the stock of Coxe Brothers & Co., Inc., was not excessive and that the stock has proved a profitable investment in itself considered, was made clear by the defense. In this purchase, which involved a total consideration of $19,000,000 was included the stock of Coxe Brothers & Company, Inc., the stock of the Delaware, Susquehanna & Schuylkill Railroad Company, and the stock of four water companies (Government Exhibit 42, R., 665). In the agreement for the purchase the consideration is stated as $18,400,000, but that was because $600,000 had to be paid by the Lehigh Valley Railroad Company on some cars which had been ordered by the Delaware, Susquehanna & Schuylkill Railroad Company, but not yet received from the manufacturers. Now in its attempt to break the force of the defendants' explanation of the investment the Government has treated the earning power and financial status of Coxe Brothers & Co. and the earning power and financial status of the Delaware, Susquehanna & Schuylkill Railroad Company as if they were two separate matters, but from the standpoint of this purchase they may not be so considered. The stockholders of the Lehigh Valley Railroad Company will measure the value

of that purchase by what appears in the net income of the Railroad Company, and to determine that, both parts of the purchase must be considered together. The propriety of the purchase, considered purely from the financial standpoint, can be fully justified by analyzing the results shown in Railroad Exhibit 74 (R., 2340) and its details have been carefully and elaborately worked out and explained by the General Auditor of the Railroad Company (Mr. Morrison, R., 1336, *f.*). There were $19,000,000 of bonds issued on account of the purchase and some $82,000 of incidental expenses. Taking from this the value of the coal cars received,—1,000 in number,—in excess of the unpaid balance paid thereon by the Railroad Company, and taking the cash received from the conversion of some current assets possessed by Coxe Brothers & Company, Inc., as well as the Delaware, Susquehanna & Schuylkill Railroad Company and the four water companies, the final outlay remains $15,516,209.26. The capital stock of the four water companies was subsequently converted into 5 per cent. bonds in the amount of $60,000, so that may properly be deducted, leaving a balance of $15,456,209.26.

Up to June 30, 1905, the cash outlay amounted to a total of $7,273,105. The return from the investment came in several forms. The coal had to be hauled as theretofore from the mines of Coxe Brothers & Company to the points of junction between the Delaware, Susquehanna & Schuylkill Railroad and the Lehigh Valley Railroad. That haul cost money and was worth money. If the Lehigh Valley Railroad had secured the traffic under a joint rate it would have had to allow the Delaware, Susquehanna & Schuylkill Railroad out

of the rate a certain proportion for the haul and, based on the customary percentages, and, in fact, those which actually had been applied for some time prior to the purchase, Mr. Morrison prepared Statement "C" (R., 2347), and made up his item of accruing revenue, which is the first item under the heading of cash receipts. Therefore, on the basis of actual tonnage handled and on the basis of actual percentages granted the Delaware, Susquehanna & Schuylkill prior to the purchase, the Delaware, Susquehanna & Schuylkill is entitled to be considered as having earned up to June 30, 1913, for the Lehigh Valley Railroad money which came into the gross income of the Lehigh Valley Railroad to the amount of $5,086,024. The next item is actual revenue collected from the Pennsylvania Railroad Company by reason of its use of one of the tracks of the Delaware, Susquehanna & Schuylkill, amounting to $87,653. The next item is merchandise freight revenue accruing to the Lehigh Valley Railroad from the Pennsylvania Railroad on interchange freight and applicable to the Delaware, Susquehanna & Schuylkill Railroad on account of the use by the Pennsylvania Railroad Company of 8.03 miles of track, in the amount of $24,598. Moreover, the Delaware, Susquehanna & Schuylkill Railroad originated some merchandise freight itself in the past, and to that extent it became a factor of the Lehigh Valley Railroad and its earning power, in respect of that merchandise freight, was estimated by Mr. Morrison, based on the merchandise freight revenue of the Delaware, Susquehanna & Schuylkill for twenty-eight months prior to the purchase. In other words, he applied the rate of earnings on the merchandise freight for twenty-eight months prior to the purchase, to the

actual freight moved since and made up an estimated freight merchandise revenue of $127,175. Of course these earnings did not take place without the expense of operation and Statement "A", part of Exhibit 74 (R., 2344), shows that he made up his expense of operation, as far as possible, from the figures which the Delaware, Susquehanna & Schuylkill Railroad had recorded in their own books and reports, but where they were not available, then from the actual expense ascertainable to be incurred by the Lehigh Valley Railroad Company at the present time in the same location for exactly the same service. And the net result, after deducting such cost of operation, so ascertained, shows that the Delaware, Susquehanna & Schuylkill Railroad as part and parcel of the Lehigh Valley Railroad System may be considered to have earned since its acquisition, a little over $4,000,000. The Government has said that this result puts Mr. Morrison in conflict with his superior officer as to the value of the respective stocks, but if there is any confusion about that point it would be dispelled by a brief reference to Mr. Morrison's testimony, which, in respect of the matter, was as follows:

> "Q. Now, you also show from your statement that the purchase of the Delaware, Susquehanna & Schuylkill Railroad has been considerably more profitable to the Lehigh Valley Railroad than the purchase of Coxe Brothers & Company, don't you? That is to say, you show a net revenue accruing to the Lehigh Valley Railroad Company from the D., S. & S. according to your reconstructed income account of $4,181,688.27, whereas the net revenue accruing to the Lehigh Valley as owner of the capital stock of Coxe Brothers & Company is shown to be only $3,330,298.31.
> A. Yes.

"Q. That is to say, you think that the purchase of the D., S. & S. was a much more profitable transaction than the purchase of Coxe Brothers & Company? A. This is not what I think. I did not say that is what I though. I say this is the way the property results figure out during the period which it has been owned by the Lehigh Valley Railroad.

"Q. Well, do you believe these results to be correct? A. Yes, sir.

"Q. Well, then, you believe that the purchase of Coxe Brothers & Company was less profitable to the railroad than the purchase of the D., S. & S? A. So far, yes sir" (R., 1372).

Mr. Smith testified that at the time the offer of the stocks was made to the Lehigh Valley Railroad officers, they considered the Delaware, Susquehanna & Schuylkill the inconsequential part of the matter, because the thing that was then uppermost in the minds of the officers of the Railroad Company was the *loss of the tonnage* of Coxe Brothers & Company to one of its competing lines, which loss would have been vital to the Railroad Company. Mr. Morrison's analysis shows, beyond a doubt, that, considered from an investment standpoint, the Delaware, Susquehanna & Schuylkill Railroad has turned out to be the better purchase, relatively considered, but that involves no conflict whatever with the testimony of Mr. Smith and Mr. Thomas as to the original reasons for the purchase.

Government counsel say that the financial results shown are absurd and false, because they show such a disproportionate ratio of operating expenses to gross earnings, compared with the ratio shown by the Delaware, Susquehanna & Schuylkill Railroad's reports prior to 1905. But

the reason for that is made clear in Mr. Morrison's testimony and is as follows: Namely, that the seven stockholders of the Delaware, Susquehanna & Schuylkill were also the seven stockholders of Coxe Brothers & Company, Inc., and that being nothing more than a gathering line the Company, of course, was not careful to watch the distribution of its expenses among various items, and charged up in many instances to their operating expenses, as their own reports show, large amounts which today are required to be charged to capital. For example, it is absurd to think that in 1905 the ratio for the Delaware, Susquehanna & Schuylkill Railroad should have been 88.95 per cent. if the Company had been operated and its accounts kept strictly from a railroad standpoint, when in the same year the ratio for the Lehigh Valley Railroad Company, with its enormous trackage and its immense volume of low grade commodity freight, was only 60.52 per cent. Mr. Morrison showed that on the basis of the Delaware, Susquehanna & Schuylkill Railroad Company's own reports his figure as to the cost of maintaining motive power was more than reasonable (R., 1397), and that based on the experience of the Lehigh Valley Railroad the cost of $180 per car per annum, shown in the Delaware, Susquehanna & Schuylkill reports for the maintenance of equipment was most exorbitant, as the Lehigh Valley Railroad was maintaining equipment in exactly the same regions for the same traffic *at $70.05 per car per year* (R., 1398).

Moreover, the Delaware, Susquehanna & Schuylkill Railroad Company's report for 1905 shows $385,000 for repairs and renewals to freight cars, which included, according to the report itself,

$300,000 for the cost of new cars, which ordinarily would be charged to capital and would have to be today, under the rulings of the Interstate Commerce Commission (R., 1398). Mr. Morrison made up his Statement "A" as to the cost of operation on the Delaware, Susquehanna & Schuylkill in the most reasonable manner possible. For example, in determining the cars used he divided the tonnage by the average load of cars in this region, in other words, assuming that every car was used to the full extent of its capacity, and, as his exhibit shows, throughout every working day of the year. Moreover, out of the total operating expenses shown by the Delaware, Susquehanna & Schuylkill in its own reports of about $1,000,000, including, as it does, the factors mentioned there, there was nearly a third of the amount on account of the rental the Delaware, Susquehanna & Schuylkill Railroad Company paid the Lehigh Valley Railroad Company by reason of the trackage contract to Perth Amboy. For example, in 1904, it was $304,631.05 (R., 1396). Therefore, Mr. Morrison testified that there was no discrepancy between the ratio shown in his figures and the ratio shown in the Delaware, Susquehanna & Schuylkill Annual Reports, which was not fully explained by considering the above factors (R., 1398, 1399).

In addition to the above earnings, there have been received cash dividends from Coxe Brothers & Company Inc., of $3,330,298.31 and Interest on the cash receipts of something over $400,000, making total earnings of $7,938,134.14, or an excess of cash receipts over cash outlay of about $665,000, and this after taking into account 4 per cent. on every dollar disbursed (R. 2340). To call this Exhibit "preposterous" after its careful working out by Mr.

Morrison upon theories which were more than necessarily conservative and sustained after pages and pages of a vigorous cross-examination is simply a method of hiding confusion.

(f) *Summary:*

Let us take into account the utter lack of proof as to any competition between Coxe Brothers & Company and the Lehigh Valley Coal Company prior to 1905, or, if we please, take into account the fact that virtually all of its output was shipped to tidewater and certainly some percentage thereof to New England points through New York; take into account the fact that it continued to produce as much and more coal than ever, and that, even if it had closed its mines, that action could not have affected prices at New York, considering the relatively small percentage which its tonnage bore to the total sales; take into account the fact that if it sold at any points on lines of the Lehigh Valley Railroad, it was only one among the many competitors which produced coal at points on the Lehigh Valley Railroad and sold at all line points, and surely we must come to the conclusion that the mere fact that the stock of that Company came into the hands of the Lehigh Valley Railroad (not by the initiation of the Lehigh Valley, but upon an offer to sell it at a price at which others were willing to buy it and had tried to buy it), which also owned the stock of the Lehigh Valley Coal Company, both of which Companies continued their increases in production and their general sales as theretofore, and certainly here was no undue limitation on competitive conditions or any unreasonable restriction thereof. There was nothing unreasonable or undue in a purchase of that character, and

if any dealer had a choice of buying coal thereafter from only ten different dealers instead of eleven, no evil results could follow. As Mr. Chief Justice White said in the case of *Standard Oil Company* vs. *United States*, 221 U. S., 1, at page 58:

> "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

Again, page 60:

> "The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference, that is, an undue restraint."

Again, page 78:

> "In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

III. Purchase of the Delaware, Susquehanna & Schuylkill Railroad Company:

That certain parts of the Delaware, Susquehanna & Schuylkill Railroad were parallel with the tracks of the Lehigh Valley Railroad Company is not denied. Nor is it denied that the Delaware, Susquehanna & Schuylkill Railroad Company was engaged in interstate commerce, but that the few miles of track of the two companies which were parallel in the coal regions made them competitors is denied, and it likewise is denied that the purchase of the Company restricted or interfered in any way with interstate commerce.

a. The trackage contract:

The details of the trackage contract have been referred to above. The Lehigh Valley Railroad Company entered into that contract and gave the D., S. and S. Railroad the right to run its trains over the Lehigh Valley rails to Perth Amboy. The contract was renewed in 1904 for a period of fifteen years. It was a profitable one to the Lehigh Valley as it had nothing more to do than to let the D., S. & S. Company haul its cars with its own power over the

Lehigh Valley rails and receive for that privilege .00287 cents, or nearly 3 mills per ton per mile. Where the Lehigh Valley Railroad itself carried the coal, involving all the expensive work connected with the haul and the terminal service in connection with delivering the coal, its gross revenue was only .00737 cents per ton per mile (R., 727). And under the contract the Railroad Company in addition received 12 cents per ton for any terminal work done at Perth Amboy.

Therefore, with this profitable contract to run for fourteen more years, the Railroad Company would not have caused its abolishment, if the Coxe family had not insisted upon selling the D., S. & S. with the stock of Coxe Brothers & Company and if it had not been vital to the Lehigh Valley Railroad Company that the stock of the latter Company should not fall into hostile hands. It is a far stretch of the facts to say that any motive to restrain trade was involved in that purchase. Moreover, the contract had only been renewed the year before, and if the Lehigh Valley Railroad had had any motive to keep the D., S. & S. Railroad trains off its rails and restrict the interstate commerce of that Company, it could simply have refused to renew the contract the year before; and if it did not have the motive in 1904 and did not have it until 1905, it could with all probable success have simply cancelled the contract anyway, because it was undoubtedly *ultra vires* on the part of the D., S. & S. Railroad Company, the charter of that Company only giving it the right to exercise privileges as a railroad in three counties in Pennsylvania, namely: Luzerne, Carbon and Schuylkill (R., 2129).

In the case of *United States* vs. *Reading Com-*

pany, et al. (183 Fed., 427), the case where a general combination among all the anthracite carriers was alleged, Judge Lanning, referring to the acquisition of the New York, Susquehanna & Western Railroad Company by the Erie said:

> "The argument that the primary object or effect of the acquisition of the stock of the Susquehanna by the Erie was to suppress competition in interstate commerce between those two railroads is not convincing. So many other roads reached into the anthracite fields of Pennsylvania and transported coal to New York Harbor, that the elimination of competition between the Erie and the Susquehanna in the anthracite coal business could have had no substantial effect upon the business or upon the price of coal at New York Harbor".

That acquisition involved a railroad practically parallel with the Erie all the way from the mining regions to New York Harbor, a company having a capital stock of $26,000,000 and with gross earnings of over $2,000,000, and as Judge Lanning said, at page 479, "it and the Erie controlled lines which would have enabled them to compete in the procurement and transportation of coal".

Again, referring to the acquisition of the Jersey Central Railroad by the Reading in that case, Judge Lanning said:

> "The argument that the Philadelphia & Reading and the Central were not competing but were connecting roads is not sound. • • • Whatever suppression of competition resulted from the combination, it was but an incidental effect of a scheme to save the business of the Philadelphia & Reading. Indeed the elimantion of competition between the Philadelphia & Reading and the Central in

> the anthracite coal carrying business was too small a thing to have been an important element in the object of the combination" (p. 489).

If, after the D., S. & S. Railroad had been given the right by the Lehigh Valley to carry coal on its tracks, it must be considered a competitor of the Lehigh Valley Railroad, certainly the acquisition of the Company merely extended one of the factors in the general competition, and therefore the acquisition was such a minor element that it could not affect the general flow of commerce. In speaking of the acquisition of the Susquehanna by the Erie and the acquisition of the Jersey Central by the Reading in the old Reading case, Mr. Chief Justice White said in 226 U. S., 372:

> "These are all minor combinations in which only some of the defendants participate. The accomplishment of these several subordinate transactions fully completed one or another of the several groups of carriers and coal producing companies, which several groups were thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing, one with another, * * *".

The Government has referred to the anthracite traffic which originated on the D., S. & S. as if that was a traffic for which the Lehigh Valley competed against the D., S. & S. What, assuming the trackage contract did not exist (and it was made voluntarily by the Lehigh Valley and had but a comparatively short time to run), would have been the situation? The D., S. & S. connected with several other lines and those lines might have competed against the Lehigh Val-

ley for this tonnage. The D., S. & S. itself went nowhere. The only element of competition that could have been involved was that encountered from the lines that connected with it, but this tonnage and the gathering line which held it was the *thing competed for* and not the competitor, and the Lehigh Valley Railroad acquired the thing competed for, which is the beneficial result and the sole purpose of competition, and *did not acquire any of the competitors*. It was the combination of competitors or the acquisition of competitors which has been condemned in the cases, and not the acquisition of the thing competed for. The latter action has represented the exercise of lawful authority and the normal and healthy growth of business and commercial activity. If the logic of Government's case were good in respect of the few miles of track constituting the D., S. & S., then it applies in respect of the merger of every subsidiary line in the coal regions, and leads to a *reductio ad absurdum*.

b. The local traffic:

Railroad Exhibit 75 (R., 2348) shows the tracks of the Delaware, Susquehanna & Schuylkill Railroad and the tracks of the M. & H. Division of the Lehigh Valley, which are in the immediate vicinity. The total trackage of the Delaware, Susquehanna & Schuylkill Railroad is 75.31 miles, against the total track mileage of the Lehigh Valley in November, 1905, not including the D., S. & S., of 2957.84 miles. The longest distance between any colliery on the D., S. & S. and any connecting line in the normal course of traffic is a little over twenty miles.

Mr. Gildroy, who is now and for many years has

been Superintendent of the M. & H. Division of the Lehigh Valley Railroad (R., 351), testified that the D., S. & S. transported the output of the Coxe family mines, supplies for the collieries and "very little outside of that, except for two or three stores, to the best of my knowledge" (R., 358), these stores being places where the miners and their families bought their household supplies. He said his recollection was that, for the whole year 1905, he did not believe they carried more than twenty-five or thirty carloads of other freight, such as ice, hay and flour, and that the less than carload freight did not amount to a car a day (R., 358). They reached the following villages:

Drifton	population	1000
Eckley	"	600
Beaver Meadow	"	1000
Oneida	"	600
Shepton	"	800
Derringer	"	300

Tomhicken, 25 or 30 miners' houses.
(R., 359-361.)

The D., S. & S. was also on the outskirts of Hazleton, with a population of some 27,000 (in 1913), and transported some freight from there "a couple of times, two or three times a year" (R., 360). There was not the slightest attempt on the part of the Government to show that any of that freight was interstate freight, small and insignificant in character as it was, and, moreover, several of the villages mentioned were reached by the Pennsylvania and Reading Railroads (R., 2348). Mr. Gildroy has been in the railroad business since 1873, and testified that he was "familiar with those elements in railroad work which are known as the

competitive features," and that he never considered the D., S. & S. Railroad a competitor of the Lehigh Valley (R., 362). He testified that when the collieries of the Coxe Estate were exhausted the rails of the D., S. & S. would be useless, except about eight miles, mentioned above, which is used for the double tracking purpose between Tomhicken and Gum Run. In the local mine service the D., S. & S. had but seven engines engaged, and all those were engaged in service which is now done much more economically by the Lehigh Valley Railroad (R., 364).

The connection between the D., S. & S. and the Pensylvania Railroad is still intact and joint rates are in effect for westbound anthracite (R., 2377), but the connection which formerly existed with the Reading Railroad cannot be used on account of some mining operations by other parties (R., 365).

Judge Lanning referred in the old Reading case to the acquisition of the Jersey Central by the Reading, the thing acquired there being a real and substantial railroad, as not being against the Sherman Act because the elimination of competition between them "was too small a thing to have been an important element in the object of the combination," page 489. So too in this case. Let's consider that those few carloads of freight a year mentioned by Mr. Gildroy were moved by the D., S. & S. in the course of interstate commerce, in spite of the lack of any proof in this Record. How could the effect of that movement by the D., S. & S. have had any results worth considering upon the traffic of the Lehigh Valley Railroad.

In the *Joint Traffic Association Case*, 171 U. S., 567, the Court said:

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer,

manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In Hopkins *v.* United States, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose,

as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however, indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

"The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and, of course, is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce."

How in any possible way the desire of either Railroad Company to carry the few cars of miners' supplies to the few small villages they both reached could have affected rates has not been shown and cannot be imagined, nor is there a thing in the Record to show that they even competed for those cars of miners' supplies, or that to the extent they moved they were interstate commerce.

In the case of *Cincinnati, etc., Packet Company* vs. *Bay*, 200 U. S., 179, the Court said:

> "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it; and where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the prohibitions of the Sherman Act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points.
>
> "Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law.
>
> "A contract for sale of vessels, even if they are engaged in interstate commerce, is not necessarily void because the vendors agree, as is ordinary in case of sale of a business and its good will, to withdraw from business for a specified period."

As to the *Union Pacific Case*, 226 U. S., 61, we need only refer to one sentence by the Court to show its inapplicability to this purchase (p. 88): "Such competing traffic was large in volume, amounting to many millions of dollars." The only traffic which by any line of reasoning might have been considered competitive between the D., S. & S. Railroad Company and the Lehigh Valley was the small amount of general merchandise the former carried, and the *gross* earnings on that were estimated by the general auditor of the Lehigh Valley Railroad Company to have been about $127,000.00 for a period of *28 months* (R., 2342). And in another connection, we have seen, Government Counsel have attacked that as being too much.

IV. The course of the relations between the Lehigh Valley Railroad Company and The Lehigh Valley Coal Company has only been such as was fully authorized by the statutory powers of the Companies, has not been against public interest and has not involved any restraint or monopoly of any part of trade or commerce.

1. *There has been no improper commingling of affairs.*

(a) *A few officers in common in past and only the President in common at present.*

Government Exhibit 22 (R., 622) gives a list of officers, directors and members of the Executive Committee of the Lehigh Valley Railroad Company from 1890 to 1913, and Government Exhibit 35 (R., 645) gives a list of officers, directors and members of the Executive Committee of The Lehigh Valley Coal Company during the same period. A comparison of the two exhibits shows that the Presidents of the two companies have been the same during that period; that of the three Vice-Presidents of the Railroad Company one, but never more than one, and only until 1909, was also one of the two Vice-Presidents of the Coal Company; that the Vice-President and General Manager of the Coal Company was never an officer of the Railroad Company, and that the Vice-President and General Sales Manager of the Coal Company was never an officer of the Railroad Company; that for about half the period, but ending in 1909, the two Companies had a common Treasurer, and for about

half the period, but ending in 1909, a common General Auditor and common Secretary. As to the Directors; of the twelve directorships of the Lehigh Valley Railroad Company during that period, never more than three of them have been occupied by men who were also Directors of The Lehigh Valley Coal Company, and of the twelve present Directors, only two are on the Board of The Lehigh Valley Coal Company, and of the seven members of the Executive Committee of the Railroad, but two are members of the Board of the Coal Company.

The Lehigh Valley Coal Company had two branches to its business up to March 1, 1912; one was the mining of coal, and the other the selling thereof. The Vice-President and General Manager, the man in charge of the mining, was never an officer, Director or employee, nor were any of his predecessors ever an officer, Director or employe in any form or manner whatsoever, of the Lehigh Valley Railroad. Precisely the same remark applies to the selling end of the business of the Coal Company, which was always in charge of a Vice-President and Sales Manager. Since March 1, 1912, The Lehigh Valley Coal Company sells its coal at the mines to the Lehigh Valley Coal Sales Company, and, therefore, since that date, has had no Vice-President and General Sales Manager. The present officer in full and complete charge of the Coal Company is its Vice-President, Mr. F. M. Chase. He was a witness in this case. He was asked about his management of The Lehigh Valley Coal Company. He has been in the employ of The Lehigh Valley Coal Company since 1879, and he has never been employed in any capacity by any railroad company. He first went to work in the

mines. He was subsequently office boy, clerk, chief clerk, Chief Accountant, Assistant to the General Manager, Assistant General Manager, General Superintendent, and, now, Vice-President and General Manager. Two of his predecessors had as boys worked upon the Engineering Corps of the Railroad Company, but had severed their connections with such work long before they came into the employ of The Lehigh Valley Coal Company (R., 1611). Counsel for the Government cross-examined him as to his duties as follows (R., 1620):

"Cross-examination by Mr. Machen:

"Q. Mr. Chase, what are the duties of the General Manager of the Lehigh Valley Coal Company? A. I have general charge of the operating of all their mines.

"Q. You are not connected with the financial operations of the Company, are you? A. I am not responsible for the financial operations, no, sir; I am acquainted with them, more or less.

"Q. How long have you been a member of the Board of Directors? A. Since 1912, July 5th.

"Q. Prior to that time you were not a member of the board? A. I was not.

"Q. And, of course, were not present at the Board meetings? A. I was not present at the Board meetings prior to that.

"Q. You are the practical man, are you, as General Manager? A. Yes.

"Q. And you have charge of the actual operation of the Company, as distinguished from its direction? A. I have charge in a large measure of the direction and operation of the Lehigh Valley Coal Company.

"Q. And the actual operation of the mines, the mining operations? A. Mining and other operations.

"Q. What operations other than—— A. The sale——

"Q. Prior to 1912 the sale of the coal do you mean? A. I did not have charge of that, to see that the prices that were made were carried out; I still see to that feature of our business.

"Q. As to the operations? A. As to the operations."

The fact, therefore, that the President of the Coal Company was the President of the Railroad, obviously had no effect upon the business of the Coal Company as such, because the mining and the selling of the coal were completely under the charge of the two officials mentioned above, who were never, in any capacity, ever in the employ of the Railroad Company except two of the predecessors of Mr. Chase, who, long prior to their connection with the Coal Company, were in an Engineering Corps of the Railroad Company, but since Mr. Thomas, the present President of the Railroad Company and of the Coal Company, has held those offices, the mining business of the Coal Company has always been in complete charge of, first, Mr. Warriner, who never had any connection with the Railroad Company, and, next, Mr. Chase, who never had such connection, and the selling end of the business was in charge of Mr. Skeele, who died in 1913, and who never was in any capacity in the employ of the Railroad Company (R., 1611). Obviously the fact that the President of the two Companies is the same can be related to no fact except the duty of the Railroad Company, as the sole stockholder of the Coal Company, to have a voice in its capital expenditures, for every share of stock in the Coal Company owned by the Railroad had always been pledged with the

Girard Trust Company, as Trustee, under mortgages in pursuance of which numerous and valuable bonds had been issued to the general public. As the sole stockholder of the Coal Company and having pledged those stocks, it was clearly the duty of the Railroad Company to keep acquainted with the capital expenditures of the Coal Company. From this duty alone resulted the identity in the presidency.

Mr. Baird, for a short period of time, as shown in the exhibits aforesaid, was Secretary of The Lehigh Valley Coal Company and was then and is now Secretary of the Lehigh Valley Railroad Company; but during his incumbency of office in the Coal Company he kept the books and records of the two companies absolutely separate and apart, just as if two different men were holding the different offices (R., 49). Such was the affirmative proof of the defendants, and not a word of testimony has been, because it could not be, offered that the official connections mentioned in any way or in any form involved a commingling of the affairs of the two companies.

In the Second Commodities Clause Case, *United States* vs. *Lehigh Valley Railroad Company*, 220 U. S., 257, the Petition of the Government alleged that such official connections had involved commingling of affairs, but the inability of the Government to sustain its charge in that connection is conclusively shown by the Record in this case. Government Exhibit 54 (R., 698) is a copy of the docket entries therein. The amended bill of complaint was filed March 30, 1910. The opinion of the Supreme Court on the amended bill of complaint was handed down April 3, 1911, and a decree appointing an examiner was filed December

14, 1911, but the Government never made a move to offer any testimony in support of its charges, and more than a year later, viz., January 27, 1913, the amended bill of complaint was dismissed,—Government Exhibit 55 (R., 700). The dismissal was upon application by counsel for the Government, and can only mean that they had failed, as they have failed in this case, in spite of the many years they have had to investigate the accuracy of the charges they have made, with all the powerful and far-reaching authority and agencies of the Government of the United States to make such investigation, because the charges were untrue.

That no commingling is to be inferred from such identity as existed between several of the officials of the respective companies is clear from the opinion of the Supreme Court in the Second Commodities Clause Case, because the Court was explicit in its language in saying that the proof of the charges would have to be made in order to reach the rule of law they thought might then apply. It is also clear, from the opinion of the Supreme Court in a later case, viz., that of the *Newport Bank* vs. *Herkimer Bank*, 225 U. S., 178 (1911), where Mr. Justice Hughes refused to infer that knowledge of the affairs of one company existed in another although "several of the officers and directors of this company were also officers and directors" of the second company, although one Titus Sheard was the leading spirit in both corporations, although in each his son-in-law was the Secretary and his nephew the General Manager, although the books of each were kept in the same office, and although "the management of the two concerns was largely in the same hands." And why? Because he found "they were distinct organizations

conducting separate businesses," and so the Record shows, without a shadow of contradiction, in this case.

(b) *The location of offices.*

The Government has attempted to show commingling on account of the location of offices. The Newport Bank Case, cited above, should be sufficient answer to the few scraps of evidence they have on this point. The Coal Company has its Secretary and Treasurer and an Auditor located on the third floor of the large office building, 143 Liberty Street. That building belongs to the Central Railroad of New Jersey and all its general offices are located in it. It also contains the offices of various coal companies, such as Madeira, Hill & Company, Whitney & Kemmerer, The Lehigh and Wilkes-Barre Coal Company, the Lehigh Coal & Navigation Company, and Meeker & Company, which seems to have become a perpetual litigant against the Lehigh Valley Railroad Company. Small significance is to be attached, therefore, to the fact that the Lehigh Valley Railroad Company occupies the ninth, tenth and eleventh floors in this same building.

The Government has referred to the establishment of an office by The Lehigh Valley Coal Company at 228 South Third Street, Philadelphia. Reference has been made above to the fact that up to about 1872 the Lehigh Valley Railroad Company occupied the property acquired by the Hazleton Coal Company on Walnut Street as its general offices, and when the Lehigh Valley Railroad Company purchased from the Pennsylvania Railroad Company the property on Third Street and sold the property on Walnut Street, it was only natural that

the Coal Company should be invited to become its tenant in the new building. While Mr. Baird, the Secretary of the Coal Company for several years, held that position, he kept all its books and records separate and distinct from those of the Railroad Company (R., 49). The business of the Lehigh Valley Coal Company is conducted in Wilkes-Barre, Pa., where it has a handsome office building of its own, seven stories high, and which it uses solely for its own affairs. It is in the centre of the City of Wilkes-Barre, far removed from any association or touch with the affairs of the Lehigh Valley Railroad Company, if that is necessarily important.

(c) *The meetings of the Boards of Directors.*

The Government has charged, but failed to prove in any way, that the Lehigh Valley Railroad Company dominates the meetings of the Board of Directors of the Lehigh Valley Coal Co. On this point the testimony of Mr. Baird (R., 1135) was as follows:

> "Q. Did you at various times attend meetings of the Board of Directors of the Lehigh Valley Coal Company? A. Yes, sir.
>
> "Q. Did any officer or director of the Lehigh Valley Railroad Company ever come to those meetings and dominate it?
>
> "Mr. Machen: Objected to as too general and calling for an opinion.
>
> "The Witness: No, sir.
>
> "Q. Have you ever seen any evidence of the acts of the Lehigh Valley Coal Company, so far as they came in your official cognizance as an officer of that Company while you held such office, being dominated and controlled or directed by the Lehigh Valley Railroad Company?

"Mr. Macbeth: Same objection.

"The Witness: No, sir."

Again, on cross-examination by counsel for the Government, Mr. Baird testified as follows (R., 1146):

"Q. Now, at the meetings of the Lehigh Valley Coal Company and other subsidiary coal companies of the Lehigh Valley Railroad Company, who are present, and how are the meetings conducted? A. The meetings are duly called.

"Mr. Boles: I object to the question in that form. The witness is not an officer or stockholder of the Lehigh Valley Coal Company.

"Q. Well, how were they conducted when you were such an officer? A. The meetings were duly called to be held at the stated time at the principal office of the company, at which meetings care was taken to see that a majority or more of the stockholders were present, either in person or by proxy.

"Q. By stockholders, you mean the Railroad Company and the directors into whose names shares had been transferred for the purpose of qualifying? A. Not always. I don't, because the Girard Trust Company is the majority stockholder in quite a number of our companies.

"Q. Yes, but under the provisions of these mortgages the Girard Trust Company is to give a proxy to such person as the railroad may designate? A. The Girard Trust Company gives us proxies upon request?

"Q. By 'giving us proxies' whom do you refer to? A. I refer to the company holding the annual meeting, or, perhaps, the railroad company, the owner, or the Company holding the annual meeting.

"Q. Yes. But I mean what individual is

the proxy given to? A. It is usually given to myself.

"Q. The practice has been to give the proxy to the secretary of the railroad company, has that been the case? A. That has been the practice for some years.

"Q. Does the secretary of the railroad company also receive proxies from the various directors of the coal companies? A. Sometimes, but not always.

"Q. Sometimes they are present in person? A. Sometimes they are."

An attempt was made to show that many transactions of importance to the Coal Company were mentioned at certain times in the minutes of the Railroad Company, but not mentioned in the minutes of the Coal Company. Called as a witness for the Government, Mr. Baird's testimony in respect of this matter was as follows (R., 30):

"Q. Now, isn't it a fact that for long stretches of time the business of the coal company was practically transacted by the board of directors of the railroad company—— A. I would not like to say so.

"Q. One moment—the transactions of its own board of directors being confined to purely formal matters or almost entirely to purely formal matters, such as the election of officers? A. That is a pretty long question.

"The Examiner: Let the stenographer read it. (Question read.)

"A. I would not like to say that that was a fact.

"Q. Let us take some examples. Look at the minutes of the coal company, say for the year 1897, any meeting you choose to take and let us see what you find.

"Mr. Boles: Were you secretary then, Mr. Baird?

"The Witness: I was not secretary in 1897.

"Mr. Boles: I object to the question.

"Q. Have you looked at any? A. Yes, in April, 1897, they created a mortgage of five million dollars.

"Q. I will ask you this question. How often did the Board of Directors meet in that year; how many times in the year 1897? A. Three times.

"Mr. Boles: Now, wait. How do you know that?

"Mr. Marchen: That is what the minutes show.

"Mr. Boles: Oh, well, that is different. There are minutes of three meetings.

"The Witness: The minutes show that three meetings were held."

In other words the very first comparison he makes between the minutes of the two respective companies shows that in 1897 the Coal Company, at one of the meetings of the Board, created a mortgage of Five million dollars. The next comparison was made apparently for the purpose of attaching some significance to the fact that the Coal Company's minutes for the year 1895 did not show that they had taken title to a piece of land at West Superior, Wisconsin (R., 31), upon which they had *previously* erected a coal storage plant at a cost exceeding $200,000. Mr. Baird was not Secretary that year, and, therefore, could not say whether the Board of the Coal Company held any other meetings that year or not (R., 32). Next he refers to a resolution by the Railroad about disposing of the Hazleton and Beaver Meadow lands, in 1895. Of course, no reference to any such plan would be found in the minutes of the Coal Company for that year, because the plan was abandoned and

obviously the Coal Company knew nothing about it (R., 32). Mr Baird said:

> "Q. I am not asking you whether it is likely, but whether it is in point of fact there? A. If it is, it should not be. They had nothing to do with it."

In 1896 the Hazleton Coal Company was formed, and the minutes of the Railroad Company refer thereto, of course, as it was proposed to transfer it to the Hazleton and Beaver Meadow lands. There is not a mention in the minutes of the Railroad in that connection of The Lehigh Valley Coal Company, except that it had purchased some improvements which previously had been made on the Hazleton lands by A. Pardee & Company (R., 33), and so also the Railroad minutes for September 11, 1896 (R., 34).

The next reference was made to the minutes of 1897. The Railroad minutes for the meeting of June 8, 1897, refer to certain improvements which should be made in collieries of The Lehigh Valley Coal Company—Government Exhibit 13 (R., 35, 606). Coal cars are loaded under collieries or breakers by dropping the coal into them through chutes, and obviously the question of expeditious handling of cars is connected with the proper condition of the chutes. The improvements are specifically mentioned in connection with the maintenance of tonnage and the necessities of the Railroad and for the reasons mentioned. Mr. Baird was not Secretary of the Coal Company in that year, as Government Exhibit 35 (R., 645) shows, and in the absence of testimony by the then Secretary of the Coal Company, Mr. Fanshawe, it is preposterous to attach any significance to the fact that the same transaction was not mentioned in the

minutes of the Coal Company, for the then Board of Directors of the Coal Company may well have considered it informally or at a meeting not recorded, or at a later meeting in the year at which they may have not considered it important enough to direct the secretary of the meeting to record it in the minutes. References were next made to some advances which are recorded in the Railroad Company's minutes for 1899 and 1900 (R., 36-37), but a reference to the character thereof, as the testimony shows, makes it difficult to understand why the Government believes that the same transaction should have been recorded in the minutes of the meetings of the directors of the Coal Company. The next reference was to the purchase of land by the Coal Company in 1904 at Chicago, and a reference to the Coal Company's minutes showed that that transaction was passed upon by the Coal Company's Board (R., 37).

There is no question that for a period of time, namely, from about 1895 to 1902, the financial status of the two companies was a matter of joint consideration at several meetings of the Board of the Railroad Company. That was a period of grave anxiety to the Railroad Company, but to say that the financial condition of the Railroad Company, which gave rise to that anxiety during that period, was the result of mismanagement or inefficiency, as the Government in this case has done, comes rather close to impertinence. There is not a scrap of evidence in this Record to give the slightest justification for such remark. The lease of the Lehigh Valley Railroad Company to the Philadelphia and Reading Railway which is used as the source of this wholly improper inference, remained in effect for about a year and a half, from February, 1892 to

August, 1893. During that time the capital obligations of the Company were increased five and a half million dollars on account of the Buffalo extension work (Railroad Exhibit 42, R., p. 2291 and Railroad Exhibit 43, R., p. 2292). The operating expenses decreased about $300,000 and the total income decreased nearly a million dollars (Railroad Exhibit 41, R., p. 2290), due solely to the loss of traffic consequent upon the period of business depression then beginning (Railroad Exhibit 39, R., p. 2288).

The reason for the anxiety was that between 1871 and 1895 there had been an extended development of the Railroad System across New Jersey and northwestwardly into New York State, all of which has been explained heretofore, with every reasonable expectation that the increase in the traffic would at once justify those extensions. The completion of the main line between tidewater and Lake Erie was not reached until late in 1892 (Wilgus, R., p. 1187). Those in the Company with foresight soon saw, as has been referred to above, the necessity of developing the System into a trunk line and they immediately bought over the equipment of the Lehigh Valley Freight Company, in which the merchandise freight had heretofore been carried, and from that time the increase in "other freight continues in leaps and bounds and soon passes the volume of anthracite freight." During this period of extension, up to 1894, the anthracite coal revenue per ton, on account of the competitive conditions heretofore explained, had decreased from $1.12 in 1871 and $1.22 in 1875 down to $.75 in 1894, and the rate per ton per mile had decreased from $.0204 in 1871 to $.0074 in 1894, or a little over seven mills (Railroad Exhibit 51, R., p. 2300). It

is a matter of judicial notice that one of the worst panics in the history of this country began in 1892 and came to a crisis in 1893, and at a most serious time for the Lehigh Valley Railroad Company, on account of the fact that it had just opened its through line to Buffalo, with all the heavy fixed charges thereby involved. It is no wonder, therefore, that *at a meeting of the stockholders,* held in January, 1895 (R., p. 38), a Resolution was adopted recommending "the abolishment of the offices of such general officers of both companies as may not be strictly necessary for the proper conduct of these companies." That was a meeting of the stockholders of the Lehigh Valley Railroad Company and they, of course, recognized that a crash of the Coal Company would mean a crash of the Railroad Company, and, therefore, the Railroad Company was enjoined by its stockholders to supervise strictly the financial affairs of the Coal Company. It was an emergency. Bonds of the Coal Company had been guaranteed by the Railroad Company, and if the Coal Company could not pay the interest and the Railroad Company had to, a receivership would have been unavoidable. For the purposes of building a trunk line the funded capital of the Company had been increased from about $53,000,000 in 1891 to $71,500,000 in 1892, to $77,000,000 in 1893, to nearly $83,000,000 in 1894, and to $93,000,000 in 1895, involving a payment of interest of less than $3,000,000 in 1891 to over $5,000,000 in 1895 (Railroad Exhibit 43, R., p. 2292). From that period until 1903, or until the Railroad Company saw signs of prosperity again, there is no question but that the Board of Directors of the Railroad Company took a close

interest in the financial affairs of the Coal Company.

Irrespective of the reasons for the fact that in the six instances mentioned, during a period of five years, the Board of the Railroad Company considered matters of financial interest to the Coal Company, certainly no inference can reasonably be drawn, from such exceptional instances, that the Coal Company had been or thereby became a mere department of the Railroad Company. Certainly, they were the only occasions on which such joint consideration took place, as counsel for the Government before the trial of this case made a microscopic examination of the Railroad's minutes from the beginning of the Railroad until 1914 and can be relied upon to have found every instance where the Coal Company's affairs were mentioned by the Board of the Railroad Company.

(d) *The Annual Reports.*

Many pages of the Record in this case were devoted by the Government to showing that the size, color, print, etc., of the Annual Reports of the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company since 1909 have been the same. About the only thing left undone was the calling by the Government of an art expert to make definitely certain that the covers of each report were precisely of the same tint (*see* R., pp. 18-20). We admit that the reports have had the same color and are in the same form and size. And why? The Lehigh Valley Railroad Company has always been the sole stockholder of the Lehigh Valley Coal Company. Therefore, it was necessary only that the Lehigh Valley Coal Company should give to the Lehigh Valley Railroad Company *one annual re-*

port, as it only had one stockholder, and it would be absurd to say that it should have each year been printed. But the Railroad Company, having at all times had this stock pledged under mortgages, and the Railroad Company having been a guarantor of many Lehigh Valley Coal Company bonds, and the Railroad Company having as one of its assets the equity in this stock, unquestionably the stockholders of the Railroad Company were entitled each year to know something of the financial condition of the Coal Company. In the last analysis it was part of their property and, therefore, for many years, the report of the Coal Company as to its financial condition was bound up with the report of the Railroad Company which was sent to its thousands of stockholders, and later, that is, since 1909, for the sake of more convenient reference and separate distribution, where the occasion might require, the two reports were printed separately, but as the primary purpose of their printing was the imparting of the information therein contained to the stockholders of the Railroad Company, they were printed in the same form as the Railroad Company's reports, as they were sent out together to each stockholder in one envelope (R., p. 25).

This interest of the stockholders of the Railroad Company,—a natural, proper and entirely lawful interest in the annual financial condition of the Lehigh Valley Coal Company, in view of the fact that the stock of that Company was entirely owned by the Railroad Company and pledged under mortgages, and also in view of the guarantee by the Railroad Company of many of the Coal Company's bonds, made for reasons hereinafter fully explained, is the sole explanation of the expressions in several of the Annual Reports of the Railroad

Company referred to by the Government in its attempt to have the Court infer therefrom a complete commingling of affairs.

(e) *Telegraph and Telephone Wires.*

In its zeal to establish a case the Government has made the bald assertion that the Lehigh Valley Coal Company and the Lehigh Valley Railroad Company use each other's telegraph and telephone wires, referring to Record, page 1283. The truth of the matter is, as the testimony shows, that the Lehigh Valley Coal Company has certain wires which run from certain collieries along our right of way to certain other collieries. The Railroad Company, in return for the use of these wires, gave a corresponding use of the wires which it had in other localities, by the Coal Company. The interchange of such facilities avoided capital expenditures for developing wire service, and the arrangement is covered by a signed contract, whih is on file with the Interstate Commerce Commission (R., 189, 190, 1284).

2. *The Financial Relations between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company.*

We have shown already how the life of the Railroad depended upon the life of the Coal Company and how, for that reason, the State of Pennsylvania encouraged the financial assistance of the latter by the former, first, by authorizing the purchase of the stocks and bonds of coal companies, in accordance with the Acts of March 31, 1868, and of April 15, 1869; and secondly, by authorizing railroad companies to guarantee the principal or interest of coal company bonds, by the second Act.

The fact that the Lehigh Valley Coal Company was, for many years, in a precarious financial condition does not appear to be disputed by the Government. In fact, it is clearly shown by many of its own exhibits (for example, see Government Exhibit 114, R., 967). It has never been able to pay a dividend. Now, was it better that the Lehigh Valley Railroad Company should take advantage of the authority of the Pennsylvania statutes and invest in the stock and bonds of the Coal Company, or, as occasion might require, guarantee the bonds of the Coal Company, or was it better that the Coal Company should be made to shift financially for itself, with every prospect of its going under during the period of stress which began about 1892, and not only wreck itself but, perhaps, wreck the Lehigh Valley Railroad Company, with all the consequences of public injury involved? Was it better that they should stand together, when the State said they might stand together and save themselves, or that they should stand apart and both fall?

Looked at singly, many of the financial transactions between the Railroad Company and the Coal Company have the semblance of being one-sided. But it is neither just nor legally necessary that they should be looked at that way. Having in mind the fact that none of these apparently one-sided transactions took place after 1905, and looking at them separately *and* collectively, let us see the result:

(a) *The stocks transferred to the Lehigh Valley Coal Company.*

Analysis of Railroad Exhibit 69, Record 2334, shows that every transactions between the Railroad Company and the respective coal companies

mentioned represented a fair exchange of value between the parties and, as explained by the General Auditor of the Railroad Company, was, in no sense out of the normal course of business (R., 1332 and 1353 f.).

The first item on Exhibit 69 is the stock of the New York and Middle Coal Field Railroad and Coal Company. But that stock is still held and, therefore, does not enter into the immediate discussion.

The next is the stock of the Locust Mountain Coal and Iron Company. Part of it was written down while held and part of it written up. The final book value thereof represented the honest opinion of the officers of the Company, as is evidenced by the fact that twice the stock was written down and twice it was written up, and the final value on the books was but a few thousand dollars less than the actual cash value paid many years before, in spite of the fact that in the meantime the property had been constantly mined, involving the depreciation in the value of the stock naturally consequent. A reference to Government Exhibit 103 (R., 895) shows the return received on the various parcels of stock while held.

The next item is the capital stock of the Luzerne Coal & Iron Company and the Green Land Company. It was turned over for an exactly equivalent amount of the capital stock of the Lehigh Valley Coal Company, within a few years of its acquisition.

The next is the stock of the Franklin Coal Company. A reference to Government Exhibit 103 (R., 889) will show that a par value of $111,600 of stock was given a book value with the Company in 1870 of $168,300. Later, when a little more of the

stock was acquired, it was given a book value of $180,600, and so remained until 1882. Some return on the stock had been received in the meantime. In 1883 it was written down to $100,000 and in 1885 to $86,000. In 1889 it was written up to $87,000 and all this before there was any thought of transferring it to the Lehigh Valley Coal Company. Can it be justly said, therefore, that the writing up and the writing down had any relation to its sale to the Lehigh Valley Coal Company in 1891? Is it not proof of the correctness of Mr. Morrison's testimony in respect of this subject, wherein he explained that the writings up and writings down of these various coal stocks were treated, as apparent from the books of the Railroad Company, the same as the Lehigh Valley Railroad Company treated securities of other kinds it ownd. and the same as Railroads generally throughout the United States treated the securities they owned? That is, if there was an intrinsic decline in the value of the security and the management of the company was honest, they wrote the security down. Or if the company at the end of a particular fiscal year was flush they wrote down the book value of some of their possessions, and in this connection he mentioned the fact that in every instance the writing up or writing down occurred at the end of the Railroad Company's fiscal year. A practice of that kind is sanctioned by the Interstate Commerce Commission in their accounting rules (R., 1405). At other times, when the company might have found it necessary to show as much of assets as it could properly, it would look around among its possessions and to the extent the facts warranted write them up to the values justified by honest investigation. The accounting rulings of the Inter-

state Commerce Commission sanction such practice even today (R., 1405).

The next item is the stock of the Humbolt Coal Company. This stock cost the Lehigh Valley Railroad Company $355,000, and was transferred for exactly the same amount.

The next item is the stock of the Delano Land Company. It cost the Lehigh Valley Railroad Company, during a period of acquisition, from 1873 to 1881, $555,000. In 1881 it had a book value of that amount (see Government Exhibit 103, R., 888). The next year it was written down to $350,000; the next year to $200,000, and in 1888 it was written down to $100,000, that is, six years before it was transferred to the Lehigh Valley Coal Company, and in 1891 was transferred to the Lehigh Valley Coal Company for $100,000. Railroad Exhibit 69 shows that each writing down occurred at the end of the Railroad Company's fiscal year and that the value at which it was transferred was reached six years before the sale to the Coal Company. Certainly, no intent to confer a favor of a preference can, therefore, be found.

The next item is the stock of the Mineral Spring Coal Company. The first lot of $167,700 par value was immediately given a book value of $83,850, thirty-one years before the transfer to the Coal Company. A reference to Government Exhibit 103 (R., 896) shows that more stock was acquired in 1874, and the whole was given a book value of $90,168. The next year a little more stock was acquired, and between 1875 and 1883 the stock was written down from $91,464 a little each year, until in 1883 it had a book value of $5,000. This was twenty-one years before the transfer to the Coal Company. The book value remained at that amount until 1901,

when more of the stock was acquired and the book value was increased from $5,000 to $25,820, and so it remained until 1904, when all the stock was transferred to the Lehigh Valley Coal Company. As Railroad Exhibit 69 shows, the stock was finally transferred at a par value of $300,000, whereas it had only cost the Railroad Company $112,284, but in 1904 it was transferred to the Lehigh Valley Coal Company for $300,000 par value of the stock of the Lehigh Valley Coal Company. Of course the Government does not refer to this as a preference or a favor received *from* the Lehigh Valley Coal Company. As the stock of the Mineral Spring Company stood on the books at a book value of $25,820, so the stock received from the Lehigh Valley Coal Company was placed on the books of the Railroad Company at the same figure.

The next item is the stock of the Coal Ridge Improvement & Coal Company. That stock cost the Lehigh Valley Railroad Company $392,428. It was written down twenty-five years before it was transferred to the Coal Company and in 1905 was turned over to the Westwood Coal Company at the then book value thereof, which company was merged into the Hazleton Coal Company, which latter company, in turn, was merged into the Lehigh Valley Coal Company. If, therefore, the Railroad Company, at least twenty-five years before it disposed of the stock, had written it down to a book value of a certain amount, certainly no criticism can attach to the fact that it transferred the stock at the end of that twenty-five years at the value it then stood on the Railroad Company's books.

The next item is the stock of the Hazleton Coal Company, acquired in 1896. As has been previously explained, this company was organized that year

to take over the Hazleton and Beaver Meadow Coal Lands, which belonged to the Railroad Company. The bonds and stock issued by the Hazleton Coal Company in return for the assets received, were, in 1896, placed on the books of the Railroad Company at a value of $880,000, which was substantially the same amount as the book value at which the lands at Hazleton had been carried. Of these bonds $156,000 were redeemed in cash and the remainder, on $724,000 were transferred for Certificates of Indebtedness of the same amount, on which, as will be hereafter seen, interest was paid at 4 per cent., as long as they were held by the Railroad Company.

The next item is the stock of the Westwood Coal Company, which cost the Lehigh Valley Railroad Company a little over $117,000, and which was transferred in consideration of $665,000 of the stock of the Hazleton Coal Company, which was given a book value of exactly the same amount as the stock of the Westwood Coal Company had cost the Railroad Company. The disposition of this Hazleton stock is explained in the next item under the heading of the Hazleton Coal Company, showing that it, together with securities worth about $260,000 and the E. A. Packer Mortgage, worth a little under $18,000, were valued by the Railroad Company at about $395,000, without any writing up or writing down, and were transferred to the Lehigh Valley Coal Company for $665,000 of the stock of that company, which stock was placed on the books of the Railroad Company at the value at which the securities transferred therefor had been carried, namely, about $395,000. The item of $259,886 is clarified by a reference to Government Exhibit 103 (R., 886) where it is shown that between 1885 and

1904 the Railroad carried the stock of the Coal Ridge Improvement & Coal Company at $201,000, which, together with the $58,886 shown on Railroad Exhibit 69, makes up the item of $259,886, shown on Railroad Exhibit 69. There again the book value of the securities transferred was reached nearly twenty years before the transfer. Stock of the Lehigh Valley Coal Company received therefor, if rated at par, was worth considerably more than the securities and property for which it was received cost the Railroad Company, because the Hazleton and Beaver Meadow Lands, transferred to the Hazleton Company, were paid for in bonds for which full and adequate value was received, as explained above.

The next item is the stock of the Wyoming Valley Coal Company. It cost the Railroad Company a trifle over $500,000; had a final book value of that amount, and in 1908 was transferred to the Lehigh Valley Coal Company for $350,000 of its stock, which was properly placed on the books of the Railroad Company at the amount the securities transferred had cost the Railroad Company, namely, $501,186.24.

But the fact that stock of the Lehigh Valley Coal Co., having a par value of $350,000 was received for stock of the Wyoming Valley Co. having a book value of over $501,000 does not mean that the Railroad Company lost the difference between those amounts in the transactions, because on Railroad Exhibit 69 will be seen the item relative to the acquisition of the stock of the Lehigh Valley Coal Co., an item of $1,965,000, and under that item will be found the list of stocks which were transferred to the Lehigh Valley Coal Company in return for

the stock of the latter company, which were as follows:

Luzerne Coal & Iron Co.....	$600,000.00
Green Land Company.....	50,000.00
Mineral Spring Coal Co.....	300,000.00
Hazelton Coal Co.....	665,000.00
Wyoming Valley Coal Co.....	350,000.00
Total.....	$1,965,000.00

In other words, the par value of the stock of the Lehigh Valley Coal Company was exactly the same as the par value of the stock of the constituent companies transferred, notwithstanding the fact that the book value on the books of the Lehigh Valley Railroad Company of all those constituent stocks was but $1,470,620.12; which values were determined as explained in paragraphs above dealing with the respective companies. And that no questionable element should be involved in the transaction, the Lehigh Valley Railroad Company placed the said item of stock of the Lehigh Valley Coal Co. on its books at a book value even less than the stocks of the said constituent companies had been carried, to wit: $1,422,005.43, compared with the aggregate book value of the constituent companies stock of $1,470,620.12.

The next item is the stock of the Seneca Coal Company. It cost the Railroad Company $335,000 in cash and $665,000 in its own bonds, or a total of $1,000,000. Four years before the transfer to the Coal Company it was written down $200,000. It was later written down $27,000 on account of mining, leaving a final book value of $773,000, at which it was transferred to the Lehigh Valley Coal Company in return for Certificates of Indebtedness

which were fully worth par at which they were carried, as interest at 4 per cent. was paid thereon, and they were finally redeemed dollar for dollar, as hereinafter explained.

The next item is the stock of the Connell Coal Company, which cost the Railroad Company $300,000 in cash and $600,000 in its own bonds, or a total of $900,000. In 1901 when acquired it was placed on the books of the Railroad Company at that value. The next year, that is, three years before it was transferred to the Coal Company, but before there was any contemplation of its being transferred to the Coal Company, it was written down to $455,000 (see Government Exhibit 103, R., 887). It was written down again in June, 1904, on account of mining, as Railroad Exhibit 69 shows, and had a final book value thereafter of $412,000, at which amount the following year it was transferred to the Lehigh Valley Coal Company in exchange for Certificates of Indebtedness of like amount.

The next item is the stock of the Warriour Run Mining Company. It cost the Lehigh Valley Railroad Company about $201,000 in cash and $800,000 in its own bonds, or a total of $1,000,932. On account of materials acquired in connection with the purchase of stock which had a value of $2,645.51, the stock was written down that amount, plus $286.49 to make it an even figure on the books, leaving a final book value of $998,000.00, or the amount it had cost the Railroad Company. And at this amount it was transferred to the Lehigh Valley Coal Company in exchange for the Certificates of Indebtedness.

The next amount is the stock of the Wyoming Coal and Land Company. It cost the Railroad

Company $130,000 in cash, plus about $55,000 to pay off some bonds, or a total amount of $184,706.07, which was *written up* $5,293.93, giving a final book value of $190,000, at which it was transferred to the Lehigh Valley Coal Company, in exchange for Certificates of Indebtedness.

(b) *The bonds of the Lehigh Valley Coal Company.*

The Government has attempted to give the impression that certain transactions relating to the bonds of the Lehigh Valley Coal Company owned by the Lehigh Valley Railroad Company involved financial preferences accorded the Coal Company, but a reference to Railroad Exhibit 69 will fully answer the charge. The fourth item from the bottom shows that the first mortgage 5 per cent. bonds of the Lehigh Valley Coal Company, amounting to $10,500,000, were acquired in 1893, and that the second mortgage 5 per cent. bonds were acquired in 1897 in the amount of $5,000,000. Both were placed on the books of the Company at the par value, or a total of $15,500,000. They were owned by the Railroad Company and, therefore, could be disposed of as the Railroad Company pleased. Of the first issue nearly the entire amount was disposed of in 1894 and 1895. That is, $9,100,000 were sold to various parties.

As has been mentioned before, this was a period of business depression, due to the financial crisis, which came in 1893, and, therefore, if any conclusion is to be gathered from the fact that these bonds were sold at the small discount of $30,000 that conclusion should be that, in view of the business condition of the time, it was a fine sale. The Railroad Company had been obliged to stop paying

dividends. Both it and the Coal Company were in precarious financial condition, and to sell bonds guaranteed by it at a discount of one-third of one per cent. does not seem bad.

The remainder of this issue, consisting of $1,400,000, was retired by receiving from the Coal Company $1,330,000 in cash and a Certificate of Indebtedness for $70,000 to cover the discount on that and another issue (Railroad Exhibit 69, R., 2334). The second mortgage of 5 per cent. issue of $5,000,000 was retired by receiving a Certificate of Indebtedness for a like amount. Now the Government says that although dollar for dollar was received on the principal we did not receive anything by way of interest while we held the bonds. But the answer to this charge is also seen in Railroad Exhibit 69, wherein it will be noticed that the $10,537,000 of Certificates of Indebtedness received from the Lehigh Valley Coal Company embraced an item of $28,000 interest. A reference to Government Exhibit 103 (R., 894) will show, moreover, that virtually all these bonds were disposed of in the first two years they were held by general sale to the public, and that on the remainder $245,000 interest was received.

When the Railroad Company sold the bonds they were sold with the Railroad Company's guarantee of principal and interest, thereby making them the Railroad's own obligations. The Railroad Company, therefore, having received the funds and using them and receiving the value thereof, it is difficult to see any justification for the Government's charge that interest should necessarily have been collected also from the Coal Company. Of course the Railroad Company paid the interest on these bonds while the public held them, *because, by*

guarantee of principal and interest, it had made them its bonds, and it received the funds and used them.

As to the second mortgage bond of $5,000,000 issued in 1897, mentioned in Railroad Exhibit 69, it is true that no interest was paid thereon during the eight years held by the Railroad Company. But a reference to Government Exhibit 107 (R., 931) will show that this bond was given by the Coal Company to the Railroad Company "in liquidation of advances previously made by that company to the Lehigh Valley Coal Company for purchase of new properties and for improvements." In other words, the money advanced had gone into additions and betterments to the property of the Coal Company and represented that much more intrinsic value in the stock of the Company all held by the Railroad Company. Therefore, the bond might just as well have been converted into stock because the fact that it was a lien on the property was of no value to the Railroad Company, owning all the stock. The Coal Company could not pay the interest, just as it could not pay the dividends. It did not have the funds. It was therefore, not a preference to fail to collect interest on this bond, because it might just as well, under the circumstances, have been converted into stock and the dividends which might have been paid thereon could never have been entered up as a debt.

The Government refers to $2,000,000 of "5-10 year 5 per cent. Coal Pledge Bonds." They make it appear as if a preference was involved in that transaction. But a reference to the Government's own exhibit (Government Exhibit 19, R., 616) and Government Exhibit 37 (R., 654) shows that the transactions were concurrent and that the Certifi-

cate of Indebtedness issued to cover the amount advanced to pay off these bonds was issued June 30, 1905, and 4 per cent. interest was paid thereon thereafter (Government Exhibit 103, R., 894).

(c) *Certificates of Indebtedness.*

These certificates were issued by the Lehigh Valley Coal Company to the Lehigh Valley Railroad Company, June 30, 1905, in consideration of the transfer of certain bonds and stocks by the Railroad to the Coal Company, and the items are shown in detail on Railroad Exhibit 69 (R., 2334), and in another form in Railroad Exhibit 89 (R., 2413). The Government appears to be grieved that interest *was paid* thereon. They are most prolix in their explanation that interest was never intended to be paid thereon. If the Railroad had not received interest thereon there would have been a growl of another kind, but when in 1912 the certificates were paid off in part and refunded in part and the interest was then settled, then the Government said we received the interest because the Interstate Commerce Commission admonished us on the subject. But let us see whether any interest was intended from the beginning to be paid thereon. The Acounting Vice-President's letter to the General Auditor of the Railroad of June 30, 1905, says:

> "They are not intended to bear any *specific rate of interest* and none is to be paid thereon."

If that sentence means what the Government says it means, then it took an unusual amount of words to express a simple fact. In relative proportion to the rest of the letter the sentence would have read:

> "No interest is to be paid thereon."

But Mr. Platten used the word "specific", and if that does not mean that the rate had not been determined on, then the whole forepart of the sentence is meaningless. Mr. Morrison says that as an auditor and as the successor of the General Auditor to which it was addressed he would construe it to mean that the rate had not been fixed and therefore, he was not to accrue any interest on the Railroad Company's books (R., 1333). He also explained that the instructions to the Treasurer would cover the collection of interest and in that connection Railroad Exhibit 70 (R., 2335) introduced Mr. Platten's letter to the Treasurer, which was contemporaneous with his letter to the General Auditor. Let us take these two letters together in conjunction with Railroad Exhibit 86 (R., 2380), which is an extract from the minutes of the meeting of the Board of Directors of the Railroad Company, August 24, 1905. It mentions the fact that the certificates had been pledged under the General Consolidated Mortgage of 1903 and states that the President reported that "he was advised by the General Solicitor that the said trustee will not be entitled to collect the principal *or interest* of the indebtedness represented by the said certificates unless this company shall be in default under said mortgage and that (in the absence of such default) the Railroad Company will be entitled under the above Paragraph 2 (referring to the Mortgage) to receive the principal *and interest,*" etc. There is also quoted therein a letter from W. N. Ely, Vice-President of the Girard Trust Company, the above mentioned trustee, wherein the Trust Company acknowledged the receipt of a letter of June 21st taken there by Mr. Drinker, then General Solicitor of the Railroad Company, and ex-

pressing the understanding of the Trust Company "that in the event of these certificates being paid off the Railroad Company will be entitled to receive the principal *and interest* thereof," etc. That letter was written thirteen days after the execution of the certificates and is transcribed in the minutes of a meeting held within two months after the execution of the certificates and ought to be conclusive proof that there was an intent to require interest.

When the certificates were paid off in 1912 $3,037,000 was paid in cash and $7,500,000 par value of fifty-year 4 per cent. debenture bonds was received for the remainder, or a total of $10,537,000, and at the same time interest was paid thereon in full, at the rate of 4 per cent., and in the amount of $2,809,866.67 (Government Exhibit 103, R., 894), the "tardy" payment of interest is admitted. That was part of the transaction and part of the consideration. And that the certificates were payable at the pleasure of the debtor can be construed as no preference, because it put it in the hands of the Coal Company to pay them in a day or a week, if it so desired, and whether the Railroad Company then wanted to give up the investment or not. How the Government can contend that not less than 6 per cent. should have been paid on these certificates is difficult to understand, when they produce no proof of any kind that 6 per cent. would have been the reasonable and proper rate of interest under all the circumstances.

And the same observation applies to its contention that the new bond issue of $7,500,000 should have carried a rate of interest more than 4 per cent. The Government contends that because $195,910.11 was written off by the Railroad Company to Profit and Loss at the time these bonds were issued, the

transaction represented a gift of such amount to the Coal Company. But, turning to Railroad Exhibit 69 (R., 2334) and to Mr. Morrison's testimony (R., 1351 f.), it is seen that the transfer of the stock of the Seneca Coal Company was part of the consideration for the original issue of the Certificates of Indebtedness and that this stock had been written down $200,000 while held by the Railroad Company and before any evidence of any intent to convey that stock to the Lehigh Valley Coal Company. It was purchased under the authority of the Acts of March 31, 1868, and April 15, 1869, because the coal lands of the Seneca Coal Company were, as the Annual Report of the Lehigh Valley Railroad Company for the year 1901 said: "tributary to your railroad" (R., 933). The writing down of the stock had no relation to the transfer four years later of that stock to the Coal Company, but, as Mr. Morrison explained, was due to the depreciation in value because of the mining of coal while the Railroad Company held the stock, and as the time was then deemed opportune it was written down.

(d) *Other financial transactions.*

Time and again reference is made by the Government to the advances of working capital. But let us see what the Record shows in that respect. In the first place, the advances of working capital to a subsidiary company of which all the stock was owned, was, considered by itself, neither improper nor unlawful. The Railroad pursued such course in respect of many of its subsidiary companies, companies which had no relation in any way to mining or selling of coal (R., 214, 215, 402). They were loans, and the books of the Railroad Company show clearly that they were treated as loans, both

in respect of the advances to the Coal Company and the advances to other subsidiary companies, and they appear on the books of the Railroad Company among its current assets (R., 215). They constituted debts just as much as if represented by a bond or a note, and the Coal Company, like the other subsidiary companies, as soon as it came into funds, paid off the debt, as Government Exhibit 50 shows, and because of their temporary nature such advances were carried by the Railroad Company under its current assets.

Turning now, to Government Exhibit 107 (R., 924), we find the following quotation from the Annual report of the Lehigh Valley Railroad Company for the fiscal year ending November 30, 1892:

> "The net income of the Coal Company is therefore applicable to the reduction of its indebtedness to the Lehigh Valley Railroad Company. The total amount advanced at different times by that Company to the Coal Company for lands, improvements, advanced royalties, etc., exceeds $15,500,000, which has been reduced from time to time by the operations of the Coal Company to about $11,500,000. This has been further provided for by five per cent. bonds secured by a mortgage, with sinking fund, on the property of the Coal Company in the counties of Lackawanna, Luzerne, Carbon and Northumberland. These bonds mature in 1933, and both principal and interest are payable in gold."

Therefore, every advance up to that date had been refunded in cash or good bonds. Turning to Record 931 we have an extract from the Annual Report of the Lehigh Valley Railroad Company for the year ending November 30, 1897, reading as follows:

> "On April 30th, 1897, a mortgage bond for

> $5,000,000, due in 1947, and bearing interest at the rate of five per cent. per annum, being a first lien on a portion of the estate of the Lehigh Valley Coal Company, and a second lien on the remainder, was issued to the Lehigh Valley Coal Company, in liquidation of advances previously made by that Company to the Lehigh Valley Coal Company for purchase of new properties and for improvements. This bond is included in the securities covered by the mortgage and collateral trust deed of the railroad company, to which prior reference has been made."

Turning to Record, Vol. 2, p. 934, we find a quotation from the Annual Report of the Lehigh Valley Railroad Company for the year ending November 30, 1901, reading as follows:

> "Under the existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations.
>
> "The suspension of mining during the period of the strike last year and the sale of the greater portion of coal in stock enabled the Coal Company to repay to the Railroad Company a large proportion of the amount advanced by the latter company for this purpose.
>
> "The uninterrupted continuance of operations during the fiscal year just closed, restored normal conditions, necessitating advances by the Railroad Company of $1,000,000, which amount is more than represented by the increased tonnage and value of the coal in stock, as compared with November 30th, last year."

These are the advances made and returned, which are set forth in detail in the answer to Question 21 given to the Interstate Commerce Commission in Docket 4914, and which is Government's Exhibit 50 (R., 683). That exhibit shows in detail

every financial transaction which has taken place between the Railroad Company and the Coal Company other than those set forth in Railroad Exhibit 69 and the supplementary statement to Government Exhibit 50 contained in Record 681 taken with Column "D" show the amounts returned by the Coal Company in cash and bonds. Every dollar of money advanced was returned in cash or the equivalent. Other than cash, the following property was received:

1893—5 per cent. gold bonds, Lehigh Valley Coal Company, at par, $10,500,000. The value and propriety of that issue has been explained.

1896—$46,953.33, being bills receivable and accrued interest on note of A. G. Yates.

1897—$5,000,000 second mortgage 5 per cent. gold bonds of the Coal Company, explained above.

1905—Stock of the Wyoming Coal and Land Company, par value, $290,110.60, credited at a value of $130,000. Railroad Exhibit 69 shows that that stock was included in the Certificates of Indebtedness and turned over to the Coal Company at $60,000 more than that amount and, therefore, the Coal Company did not receive the credit it might have in the answer to the Interstate Commerce Commission.

1905 again—Certificates of Indebtedness for $2,650,000 explained above.

Therefore, working capital like every other financial transaction with the Coal Company was returned in full.

Column "E" in Government Exhibit 50 shows certain amounts charged off to Profit and Loss and Income. It is true that they were; but a note in that exhibit says: "The amounts shown in Column

'E' represents interest on Lehigh Valley Coal Company bonds guaranteed by the Lehigh Valley Railroad Company." The authority to make such guarantees, as has been noted, is contained in the Act of April 15, 1869. When the Lehigh Valley Railroad Company wanted to raise money it could sell its own bonds, or if the time were not opportune for making a mortgage it could sell bonds it possessed and which it was so authorized to guarantee. After it raised the funds by *treating the bonds as its own,* it wrote off the interest which accrued on those bonds as owing by the primary obligor, as no doubt it was more economical to handle the transaction that way than to attempt to issue its own bonds at that particular time. The Coal Company never paid a dividend, as it never could without sacrificing needed improvements which reasonably might be paid for out of its income. After all these transactions are looked at collectively and when it is borne in mind that the Railroad Company has always owned every share of the stock of the Coal Company, it is a tenuous argument to say that they involve preferences or discriminations. If the Coal Company had paid the amounts of interest which the Railroad Company wrote off its books, its income would have been just that much less. That many less improvements would have been made and the assets of the Coal Company would have been that much less valuable, or if it had issued bonds to raise the money for the needed improvements the Railroad Company's equity in the stock would have been just that much less valuable, and as the Railroad Company had pledged every share of stock it owned in the Coal Company under its own mortgages to the Girard Trust Company (Railroad Exhibit 26,

R., 2172, and see General Consolidated Mortgage of 1903, attached to Answer of Girard Trust Company, R., 1140 and Vol. V, p. 146), it was the Railroad Company's interest to keep the equity in that stock as valuable as might be.

As far as the principal of all these transactions is concerned the Record shows, as heretofore explained, that they were returned, dollar for dollar. Mr. Stoeck introduced various exhibits by the Government, but came only as a mathematician and his ability in that respect is not questioned. But his premises were given him by Government counsel and that these premises were incorrect has amply been demonstrated, and the clever marshalling of figures as set forth in Mr. Stoeck's various calculations upon these incorrect premises cannot impeach the validity of the transactions as explained by the defendants.

(e) *The financial transactions were not against the public interest.*

As explained above, if the Railroad Company wrote off the several amounts of interest on bonds, as shown in Government Exhibit 50, it was not a matter of undue preference or discrimination, but a loss purely incidental to the ownership of the stock. As the Railroad Company owns all the stock, in the last analysis the assets of the Coal Company are the assets of the Railroad Company. And if the funds were not there to pay interest that loss was in the same category as the loss due to the fact that the funds were not there to pay dividends on the stock.

The Government says that this was a "struggle with the independents", and that it was an unjust discrimination against shippers of coal that com-

peted with the Lehigh Valley Coal Company, and to prove its contention it cites the Coxe Brothers Case, decided in 1891 by the Interstate Commerce Commission, and the Meeker Case decided by that body in 1911. But the Coxe Brothers Case decided no such point. The considerations in respect of the reduction of the rate will be found by an examination of the decision to have been those solely relating to the transportation features. This is clear from the opinion of the Circuit Court of the United States, 74 Fed., 784 Railroad Exhibit 94, R., 2428), which was rendered upon a petition filed by the Interstate Commerce Commission, seeking to enforce its order reducing the rate to Perth Amboy. And the Commission itself said several years later that its sole consideration in that case was the reasonableness of the rate considered *per se*. In the case of *Grain Rates of Chicago Great Western Railway Co. et al.*, 7 I. C. C., 33, the Commission said, referring to the *Coxe Brothers Case*, and also to the case of *Haddock v. D., L. & W. R. R. Co.*, 3 I. C. C., 302:

> "Those cases are in no respect similar to this In both the common carrier was also the owner of extensive coal fields, and, indeed, it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the Act, and had no reference to the Act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. *Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one.*"

To support its charge of harmful results the Government next refers to the Meeker case before the Interstate Commerce Commission, Government Exhibit 64 (R., 713). The charge of alleged discrimination in that case was on account of the retroactive effect given the 65 per cent. contracts to cover the period between November, 1900, and August, 1901. As explained by the Commission in that case (R., 718), the transportation rates up to that period were made on a percentage basis, and all shippers "were accorded the same rates as were accorded to" the Lehigh Valley Coal Company. The finding of the Commission was as follows:

> "There were also a number of other shippers of anthracite coal over the lines of the Lehigh Valley Railroad, and in order to place them on an equality with the Lehigh Valley Coal Company, they were accorded the same rates as were accorded to that company.
>
> "It was the custom for all shippers, including the Lehigh Valley Coal Company, to pay the tariff rates on the various grades of anthracite to tidewater, and then by means of monthly settlements be given the benefit of the rates upon the percentage basis, which rates were known as 'adjusted rates,' and were usually considerably lower than the tariff rates; but which at certain periods, owing to advancing prices of anthracite coal, were higher than the tariff rates. The general purpose of the adjusted rates was, however, to give the shippers the benefit of rates lower than the tariff rates, and upon the whole, they accomplished this result, and the evidence shows that they were impartially applied on all shipments during the greater part of the time that they were in effect."

While negotiations were under way between the Lehigh Valley Coal Company and those from whom

it purchased coal, as to the purchase price to be paid, all shippers paid the tariff rates, and, as the Commission says (R., 720):

> "When it was finally determined on August 1, 1901 to adopt the 65 per cent. contract, the Lehigh Valley Railroad Company made a systematic effort to pay back to *all shippers,* including the Lehigh Valley Coal Company, such amounts as may have been paid during the period November 1, 1900 to August 1, 1901 in excess of the tariff rates."

In certain months the adjusted rates were lower than the tariff rates, and, as had been the custom in the past, refunds were made on the basis of the pencentage rates and made uniformly to all, as the Commission itself found. But Meeker & Company, knowing that a new basis was probable, (R., 720), "refused to settle upon the basis of the 60 per cent. adjusted rates, *even in those instances where settlement would have involved a refund to them* from the tariff rate which they had paid. Their idea seems to have been to have nothing whatever to do with the settlements upon the 60 per cent. basis, because they believed the whole matter would have to be subsequently undone and refigured upon the 65 per cent. basis."

Therefore, any charge of discrimination can be worked out of the position in which Meeker & Company *voluntarily* placed itself, standing apart from all other shippers on the Lehigh Valley Railroad—which, as the Commission said above, were treated impartially is inconceivable. The Commission awarded Meeker & Company damages, but when they say it was on account of unjust discrimination, they apparently overlooked the very recital of the facts which led up to their conclusion.

There was not a suggestion of discrimination anywhere in the case, except in respect of the matters mentioned above, and the remainder of the case and the chief issues therein related solely to the matter of the reasonableness of the anthracite rate from the Wyoming region to Perth Amboy, N. J. in respect of which the Commission ordered a reduction solely on account of its beliefs relative to the cost of transportation and the elements affecting the rate intrinsically.

The writing off of the interest by the Railroad Company on the bonds which have been referred to, even if looked at apart from the very relevant fact that the Railroad Company owned all the stock of the Coal Company anyway, has, therefore, not been shown to have been of any public injury or of any advantage to the Coal Company in its relations with its competitors. If, in the course of those investments, the Railroad Company found itself unsable to collect the interest on certain bonds which it anyway had guaranteed and sold for its own needs, what was to be gained by letting the unpaid interest accumulate on its books as a debt when it owned all the stock of the Company, and who was hurt, or what was against public interest, in writing off that unpaid interest? If the Coal Company had the money and the interest on the bonds was cancelled in order to keep it in funds to use in unfair competitive methods, to undersell in markets, to resort to false competition or to take an advantage in the anthracite markets which would be detrimental to its competitors, then the case might have a different aspect, but there has never been one of those elements or any like element in the business of that Company, and the feeble attempt of the Government to show that some *possible* ele-

ment of discrimination may have been involved is irrefutably answered by an examination, as shown above, of its own references.

It was judicially recognized by Judge Paxson in the *Lake Erie & Western case,* 132 Pa. 592; by Judge Gray in the *Commodities Clause case,* 164 Fed. 215; and by Mr. Justice White, now Chief Justice, in the same case, 213 U. S. 366; that it had been a great public benefit and of vital interest to the State that the railroad companies had been permitted and encouraged to invest in the stock and guarantee the bonds of the anthracite coal mining companies in Pennsylvania, and the loss of interest which the Railroad Company sustained came solely as an incident upon the ownership of the stock of the Coal Company and the guarantee of its bonds, a matter of inestimable benefit to Pennsylvania and to every other State where anthracite has been consumed.

(f) *Collection of freight charges.*

The payment of freight charges by the Coal Company for several years prior to 1912 has been cited as involving a preference and discrimination, and, indeed, in view of Government's counsel's mention of the *Hocking Valley Case,* 210 Fed., 735, as involving a rebate. In one or two instances the Lehigh Valley Coal Company was three months behind in its freight bills. To call it an extension of credit is a wholly inappropriate use of words. An extension of credit is by agreement. If A owes B a bill and demands its payment, and A delays for a month or two months or six months, no extension of credit is involved, because B all the time has wanted his money and has been asking for it. A neglect to pay is not the result of an extension of credit; it is quite the contrary.

Weekly bills were sent to the Coal Company by the Railroad Company (R., 417), and until the decision in the *Hocking Valley Case*, the rule in which was not finaly settled until April, 1914, it was not generally understood that a failure to sue a shipper because he did not pay up in four months involved a violation of the Interstate Commerce Act, and it is even doubtful whether that case means that. The case says "while the same privilege is *denied* to others," and speaks of the collection of charges as being unlawful "when unfairly practised."

But, irrespective of what that case means, the law on the subject, while the Lehigh Valley Coal Company was a shipper—that is, prior to March 1, 1912,—was found in the case of *Gamble-Robinson Commission Company* vs. *Chicago & Northwestern Railway Company*, 168 Fed., 161, in which the Court said, at page 168:

> "The question, therefore, is, did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier customarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.

"The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'

"The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit and reputation, which condition the rational extension of credit, such as the experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness."

And so it remained until the *Hocking Valley Case, supra,* was decided, which was about the time this bill was filed and two years after the Lehigh Valley Coal Company had ceased to be a shipper. It is even quite doubtful whether that case changed the rule, because in it a contract had been made in advance between the Hocking Valley Railway Company and the Sunday Creek Company under which $200 in cash was paid about a month after

shipments moved on account of a total indebtedness of over $25,000 and notes were taken for the balance, which were held for nearly a year, then exchanged for an equal amount of debenture bonds having three years to run. There was a clear intention and agreement as to *extension of credit* involving an extension of four years and many similar transactions were also shown to have been made. A clear agreement to give four months credit and then extending the period for four years is a wholly different matter from sending bills to a shipper weekly for the freight charges which have accrued during the previous week, insisting from time to time thereafter that he shall pay such charges weekly in the regular course of business and in but rare cases receiving payments for any shipments later than ninety days after they had moved. That distinction must be borne in mind. In the *Hocking Valley Case* the Court said, at p. 744:

> "We do not say that all credit or forbearance is discrimination. A practice by which those shippers or consignees who had established their financial credit and satisfactory business habits were *suffered* to delay payment until convenient, but frequent, settlement periods, while others were required to pay cash on delivery, might not be, of itself, forbidden."

The obvious difference between that case and the failure to enforce immediate collection from the Coal Company while it was making weekly settlements for its bills and rarely being behind in respect of any shipments more than a month or two, is clear from an examination of Government Exhibit 106 (R., 915) and the testimony of Mr. Morrison, the General Auditor of the Railroad Company (R., 412).

PART THREE.—THE COMMODITIES CLAUSE OF THE INTERSTATE COMMERCE ACT.

I. The cases as to "corporate distinctions".

The Government has contended that the Lehigh Valley Coal Company and Coxe Bros. & Co., Inc., have been identified in organization and administration with the Lehigh Valley Railroad, and are, in fact, mere adjuncts or instrumentalities of the Railroad Company, and in support of its contention has referred to certain cases which have heretofore been before the courts wherein the relations between the Lehigh Valley Railroad and the Lehigh Valley Coal Company have been commented on.

At the outset it should be said that there has not been a scrap of evidence in this case that there has been any commingling of affairs between the Lehigh Valley Railroad Company and Coxe Bros. & Company, Inc. The nearest approach to any support for such a charge is found in Government Exhibit 36, relative to the officers and directors of Coxe Bros. & Company, Inc., for the period, 1905 to 1914 (2 R., 648). It shows that for a few years after the acquisition of the stock several officers of the Railroad Company were also officers of Coxe Bros. & Company, Inc., but the Vice President and General Manager of Coxe Bros. & Company, Inc., was never an officer, director or employe of the Lehigh Valley Railroad Company, and the Vice-President and General Sales Manager was never an officer, director or employe of the Railroad Company, and those two officers alone covered the entire business of Coxe Bros. & Company, and fully managed its

affairs. At the present time the only official connection of any kind between the two companies is the following: Mr. Thomas and Mr. Smith are officers of the Railroad Company, but not directors and are respectively President of and the other a Director of Coxe Bros. & Co., Inc.; and Mr. Stotesbury and Mr. Reid are two of the five Directors of the said Company, and also are directors of the Railroad Company, but not officers thereof. Mr. Chase, the Vice-President and General Manager of Coxe Bros. & Company, Inc., is neither an officer nor director of the Railroad Company, and never was. Coxe Bros. & Co., Inc., has a corporate office at 228 South Third Street, Philadelphia, where its annual meetings are held. This is simply a matter of convenience to the Railroad Company, as the Railroad Company owns all the stock of Coxe Bros. & Co., Inc., and, of course, holds the meetings at a place in the State of Pennsylvania, convenient to itself as such sole stockholder. It has offices and accounts and records on the third floor of the building at 143 Liberty Street, New York, but, as shown above, that building is also tenanted by numerous other companies, and the nearest physical relation there, is that the Railroad Company has offices in the same building on the ninth, tenth and eleventh floors. That these facts do not mean commingling of affairs is clear from the *Herkimer Bank Case, supra*, in 225 U. S., 178, and that those few facts are infinitely removed from the assumed set of facts set forth in the amended petition in the Second Commodities Clause Case is evident from the most cursory reading of the opinion in that case.

Turning to the Lehigh Valley Coal Company, the Government has referred to the remarks of

Judge Buffington in the old Reading Case, 183 Fed., 427. The issues in that case related to an alleged combination in restraint of trade between several anthracite carriers, viz.: The Philadelphia and Reading Railway Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna and Western Railroad Company, and various coal companies. Neither the pleadings nor the proof raised any issue as to the separate ownership of the stock of the Lehigh Valley Coal Company by the Lehigh Valley Railroad, or the separate relations between those two companies. Therefore, whatever might have appeared in the Record in respect of those relations was *dehors* the issue, irrelevant and *unanswered*, and, consequently, no foundation for any finding in respect of the effect of such relations. The remarks of Judge Buffington were not based upon any issue joined in respect of that relationship and must be considered purely *dicta*, based upon what unanswered matters may have appeared in the Record irrelevant to the issues in this case. And the same observations apply in respect of the remarks of Justice Lurton in the opinion which was rendered on the appeal.

The next case referred to is that of *Interstate Commerce Commission* vs. *Baird*, 194 U. S., 25. That case arose on a petition by the Interstate Commerce Commission requesting an order requiring Mr. Baird, the Secretary of the Railroad Company, to produce certain papers, among them being the so-called 65 per cent. contracts. The papers were desired during the course of a hearing before the Interstate Commerce Commission in a case brought by William Randolph Hearst against The

Philadelphia and Reading Railway Company and all the other anthracite carriers relative to the reasonableness of their anthracite rates. The witness Baird was Secretary of the Lehigh Valley Railroad Company and also at that time Secretary of the Lehigh Valley Coal Company and in the latter position had custody of the so-called 65 per cent. contracts, to which the Lehigh Valley Coal Company was a party. He refused to produce them on the advice of counsel that they did not relate to any subject which the Interstate Commerce Commission had the power and right to investigate, but related rather to the private business of persons who were not parties to the proceedings before the Commission. The same point was raised in respect of the other defendant Companies, to wit, the Erie, Lackawanna, Reading and Jersey Central. The sole issue in the case was whether the 65 per cent. contracts related to a subject which the Interstate Commerce Commission had the right to investigate under the Interstate Commerce Act, and no more concerned the Lehigh Valley than it concerned the Erie, Lackawanna, Reading and Jersey Central Railroads. The Court said (p. 41):

> "The contracts are between certain coal companies and independent operators engaged in mining coal in that region. The testimony shows that the coal companies making the contracts are principally owned by the railroad companies. For what purpose this separate ownership is maintained it is not necessary now to inquire. The fact of such ownership is undisputed, and for the present purpose it may be conceded that the ownership is lawful under the laws of the State of Pennsylvania."

In continuing his opinion, Mr. Justice Day, at page 43, said that the contracts were made by coal

companies which the railroads "practically" owned, and that, therefore, such contracts had a direct relation to a large amount of the tonnage carried by the railroads, and might be examined by the Interstate Commerce Commission in order that that body should "know how interstate traffic is conducted, the relations between the carriers and the shippers, and the rates charged and collected." Moreover, it was *claimed* by the Commission that the real purpose of the contracts was "to fix a rate for transportation for the carriers." As to our present point, the significant part of the opinion (here follows (p. 43): "It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established." The Court said that the Commission "should not be too narrowly constrained by technical rules as to the admissibility of proof." Justice Brewer dissented. It is submitted that all that can be gathered from that case is that the Court felt that the Interstate Commerce Commission, with the powers given it to investigate rates, had the right to see certain contracts which coal companies had made, because it was claimed that such contracts affected rates and because there was a possibility that they may have affected rates in view of the fact that the coal companies were *practically owned* by the railroad companies. *The ownership of stock* was the sole test applied in arriving at that conclusion.

Next is the Second Commodities Clause Case or the case of *United States* vs. *Lehigh Valley Railroad Company*, 220 U. S. 257. The rule in that case might just as well have been announced as a matter of *obiter dictum* in the first case, *i. e.*, in the case of *United States* vs. *Delaware and Hud-*

son Company et al., 213 U. S. 366. In the first case it was held that the ownership of stock did not involve an interest direct or indirect within the meaning of the Commodities Clause, and then the Government said—"Well, we will go further and show that there is more than ownership of stock; that corporate distinctions are obliterated." And the Court said—"Well, if you can show that, perhaps there is an interest direct or indirect within the meaning of the Commodities Clause." The opinion in the second case does not say that the "commingling of affairs" by itself means anything at all. This is evident from the following quotation from the opinion of the Court (220 U. S. 268):

> "The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, viz., the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real independent existence and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:
>
> "The coal company is not a *bona fide* mining company, but is merely an adjunct or instru-

> mentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant.'"

Let us see what were the details, bearing in mind the fact that the case was decided by the Court solely upon a *draft of amended bill* without even an answer by the Railroad Company. The draft of amended bill averred the following things: (1) The Railroad owned the stock of the coal company; (2) The railroad deprived the coal company of all real independent existence; (3) The railroad made the coal company virtually an agency, dependency or department; (4) The railroad company commingled the operating of the affairs of the mining company with its own; (5) It rendered it impossible to distinguish as a matter of fact between them; (6) It caused the coal company to *buy up all the coal* produced by other mining companies in the area tributary to the railroad; (7) It caused the coal company to fix the price at which the said coal was bought; (8) It established the price at which the coal should be sold when it reached the seaboard; (9) It controlled, directed, dominated and supervised all the operations of the coal company embracing the mining and production of said coal and the sale thereof at the seaboard. These are the things mentioned by the Supreme Court in its opinion and are sufficient for our present discussion, although many other things were alleged in the draft of the Government, including such matters as (1) the selection of the employes of the coal company by the railroad company; (2) the officers of the coal company were selected because they were officers of the railroad, and (3) the work of the coal company was carried

on over office desks belonging to the railroad. Therefore, the Court said that it would amend its ruling in the first case if it were proved that the railroad company had used its power as a stockholder "*to obliterate all distinctions between the two corporations*," and, referring to the commingling of affairs, it said that the commingling should be shown to be such "as by necessary effect to make such affairs *practically indistinguishable* and, therefore, to cause both companies to be one for all purposes." It is clear that the whole opinion of the Court is based entirely upon the draft of amended bill which it had before it, and no one would reasonably attempt to say that the ruling in the case can be clearly understood unless that draft of amended bill is read in connection with the opinion, although enough of its averments were referred to by the Court and cited above to show the utter inapplicability of the case to the set of facts shown by the Record in this case. It was made a finding by Hough, *J.*, in the Court below in this case that "The allegations of the bill of complaint permitted as an amendment by the Second Commodities Case were fully denied and have never been proved;—but if they were true prior to March 1, 1912, they are now immaterial" (225 Fed., 399, 404).

The course of relations between the Lehigh Valley Railroad Co. and the Lehigh Valley Coal Co. has been dealt with in detail in another section of this Brief. All that need be repeated here is to say that, since 1909, the two Companies have had no officers or employees in common except the President, and that one of the officers of the Railroad Company has been a director of the Coal Company, and that two of the twelve Directors of the

Railroad Company have served on the Board of Directors of the Coal Company, which consists of six members. The man who runs and manages the affairs of the Lehigh Valley Coal Company is Mr. F. M. Chase, and before him Mr. S. D. Warriner, neither of whom was ever an officer or director of the Lehigh Valley Railroad Company; and when the Coal Company was engaged in the general sale of coal, its affairs as to sales were under the sole direction of Mr. J. W. Skeele, the Vice-President and General Sales Manager of the Lehigh Valley Coal Company, who was never an officer or director of the Lehigh Valley Railroad. It has its own separate offices, accounts and records, an enormous building at Wilkes-Barre, where its affairs are transacted, and, as one of the witnesses in this case testified, is as free in the management and conduct of its matters as any industry along the line of the Lehigh Valley Railroad.

Turning to the Railroad Company, its Vice-President in charge of operation is Mr. J. A. Middleton, who for several years was an officer of the Coal Company but has not been since 1909, and there is not a line of testimony in this case that while he was an officer for a few years he ever had any real relation to or direction of any Coal Company business. Under him is Mr. J. F. Maguire, General Manager of the Railroad, who has never been an officer or employee of the Lehigh Valley Coal Company. Under him all of the railroad in the State of Pennsylvania and as far as tidewater is under the jurisdiction of three Superintendents, Mr. Shea, Mr. Gildroy and Mr. Ross, who were witnesses in this case and who were never officers or employees of the Lehigh Valley Coal Company. As to the rates and traffic affairs of the Railroad, Mr.

Grier, the Coal Freight Agent of the Railroad Company, was a witness in this case, and he was never an officer or employee of the Lehigh Valley Coal Company (3 R., 1446). His superior is Mr. Blood, the Freight Traffic Manager, and his superior Mr. Jarvis, the Vice-President of the Railroad Company, and they were never officers or directors of the Lehigh Valley Coal Company (3 R., 1469, 1473), and so testified in this case.

The financial and accounting affairs of the Lehigh Valley Railroad are under the jurisdiction of Mr. L. D. Smith, Vice-President of the Lehigh Valley Railroad Company, who, except for one year as Assistant to the President in 1908, was never an officer or employee of the Lehigh Valley Coal Company, but is one of its six Directors, which position he has held since 1908.

Of the other Directors of the Coal Company, two are members of the Board of twelve Directors of the Railroad Company, and the other three members of the Board of the Coal Company Mr. Wheaton, Mr. Stearns and Mr. Chase, have no connection of any kind with the Lehigh Valley Railroad Company.

Therefore this case is to be determined by a study of the existing situation as it relates to the Lehigh Valley Coal Sales Company.

II. The organization of the Lehigh Valley Coal Sales Company.

Hough, *J.*, in the Court below in this case closed his opinion with this searching analysis (225 Fed. 399, at p. 406):

> "This case may be thus summed up: No monopoly of interstate commerce is shown,

> nor any attempt to monopolize; for the proof of the pudding is in the eating thereof, and it is impossible to find any of the normal results of monopoly without also finding violations of the commodities clause—and none is discovered. As to restraint of interstate trade in coal transported over the Lehigh Road, there can be no restraint without control, and, since the railroad does not control the coal it carries, it has no means of restraint."

Notwithstanding the efforts of the petition to work out results under the Sherman Anti-Trust law by charges against the above defendant, it is obvious that this proceeding, so far as the Lehigh Valley Coal Sales Company is concerned, is based chiefly upon the Commodities Clause (Act of June 29, 1906, U. S. Comp. Stat., Supp. of 1911, p. 1287), which forbids any railroad company to carry in interstate commerce after May 1, 1908,

> "Any article or commodity other than timber, and the manufactured products thereof, manufactured, mined or produced by it or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The contention of the Government is that the Lehigh Valley Railroad Company is violating this statute because it is carrying in such commerce anthracite coal produced at mines in Pennsylvania owned and operated by the Lehigh Valley Coal Company (the capital stock of which is owned by the Lehigh Valley Railroad Company), or bought from other mine owners in that state, or transported from the mines of anthracite operators in

Pennsylvania under commission agency contracts; the Government alleging that during such carriage the Railroad continuously retains some kind or degree of interest or ownership in the coal. The Lehigh Valley Coal Sales Company has denied that any such interest or ownership exists, averring that it purchases the coal from the Lehigh Valley Coal Company at the collieries in Pennsylvania, and that the coal is sold by the Lehigh Valley Coal Company to this defendant in good faith before the carriage begins.

In May, 1908, the Lehigh Valley Railroad Company and five other anthracite coal railroads were brought into the Circuit Court for the Eastern District of Pennsylvania charged with violating the so-called Commodities Clause; the companies appeared and defended; the cases were disposed of on the several petitions and answers, the Circuit Court dismissing the proceedings, one of the Judges dissenting (164 Fed., 215 *et seq.*). The cases were appealed to the Supreme Court and decided, the decision being rendered May 3, 1909. The true meaning of the statute was stated by Chief Justice White, who delivered the opinion of the Court, to be as follows (213 U. S., 415):

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part;

(*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

The submission in each case was made as a result of the stipulation between counsel "that the submission on bill and answer and any averment or admission of pleadings of either party shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof" (220 U. S., 264). The cases were remanded with instructions that such further proceedings be taken as might be necessary to apply and enforce the statute interpreted as set forth above.

In March, 1910, the United States presented an amended bill as against the Lehigh Valley Railroad Company and asked leave to file it. The amendment contained elaborate averments in regard to the alleged relations existing between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company as heretofore referred to at length. In substance it averred that the Railroad Company was not only the owner of all the stock of the Coal Company, but that the Railroad Company so used the power thus resulting from its stock ownership as to deprive the Coal Company of all real independent existence, and to make it virtually but an agency or dependency or department of the Railroad Company It was expressly charged that "the Coal Company is not a *bona fide* mining company, but is merely an ad-

junct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the Coal Company, and which is transported by the defendant." It was further charged that the Railroad Company exercised its influence as the owner of all the stock of the Coal Company to cause the Coal Company to buy up all the coal produced by other mining companies in the area tributary to the railroad, and fixed the price at which such coal was bought so as to control the price and transportation thereof, and establish the price at which the coal thus ostensibly acquired by the Coal Company by purchases should be sold when it reached the seaboard.

Upon objection, the Circuit Court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice.

That motion was denied. Counsel for the Railroad Company then moved to dismiss the bill absolutely, and upon statement of counsel for the United States that it would not proceed any further in view of the fact that the proposed amendment had been disallowed, the court reached the conclusion that the bill should be dismissed absolutely upon the allegations of the bill and answer. From the decree entered the Government appealed to the Supreme Court because of the refusal of the Circuit Court to allow the proposed amended bill to be filed and because of its dismissal of the suit (*U. S.* v. *L. V. R. R. Co., 220 U. S., 257, et seq.*). The Supreme Court in its decision of April 3, 1911, held that the amendment should have been allowed, declaring that the additions thereby proposed to

the original bill were not foreclosed by the decision in the previous case (*U. S. v. Delaware & Hudson Co. et al., 213 U. S., 366*).

After summarizing the amendment as above set forth, Chief Justice White, in delivering the opinion of the Court, said (p. 271):

> "While that decision expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.
>
> "That the facts thus averred and the other

allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal compa[illegible] is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause.

"The argument is that the railroad company was so excepted, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company.

"Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by

that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same.

"This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership, particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the

> commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable."

The full text of this amendment appears in the margin of the opinion of McPherson, Circuit Judge, in deciding the case of the *United States* v. *The Delaware, Lackawanna & Western R. R. et al.*, *213 Fed., 250, 255* (4 R., 2549 *et seq.*).

It is apparent that for the purpose of deciding whether the Government's motion for leave to amend should have been allowed, the Supreme Court necessarily assumed that the averments of the proposed amendment were true. *Upon this assumption* it was held that the amendment described a relation and a course of conduct that obliterated all distinction between the two corporations, and that so commingled their affair as to cause both corporations to be one for all purposes. It was distinctly held that although a railroad company may carry in interstate commerce the product of a mining corporation in which the railroad has a stock interest, the power given by such interest must not be abused.

The decree below was therefore reversed and the case remanded. Thereafter the Lehigh Valley Railroad Company filed its answer to the charges contained in the amendment, denying the allegations *in toto*. The case in question was never tried, but there was an attempt by the Government in this case to prove some of the allegations which had been made in the amended bill in the former case. The Court below in this case in respect of all the allegations found as follows:

> "(6) The allegations of the bill of complaint permitted as an amendment by the Second

Commodities Case were fully denied and have never been proved; but, if they were true prior to March 1, 1912, they are now immaterial" (225 Fed. 399, 404).

Under the situation of the record as it stood after the case had been remanded, there was a sharp and distinct issue between the Government and the Lehigh Valley Railroad Co. as to the charge affecting the *bona fides* of the Coal Co. as a separately managed corporation, and the charge of the abuse by the Railroad Co. of its power of stock ownership. It was not like the Lackawana case where the Railroad was at the time, under its charter powers, mining and producing anthracite and also carrying it into interstate markets and selling it there. That Railroad under the decisions cited was forced to dissociate itself from its interest in the commodity it was carrying. The Lehigh Valley stoutly denied in its answer to the amended complaint any interest in the coal it was carrying that had been produced and shipped by the Lehigh Valley Coal Co. It was believed by Mr. John G. Johnson, the General Counsel, that the defendants' position was well taken, and that there was no legal necessity to make arrangements to sell the Coal Co.'s mined and purchased coal and pass title thereto prior to transportation. *He thought, however, it would be desirable so to do, to comply with the wishes of the Department of Justice, and in the hope that the case pending would then be dismissed and all further occasion for criticism be ended.*

Therefore, Mr. Johnson advised that if some plan could be worked out which would meet the views of the Department of Justice as to com-

pliance with the Commodities Clause and cause no substantial injury to the stockholders of the railroad company, it would be better policy than to have this continual friction and annoyance. Hence it was that the Executive and Finance Committee of the Railroad Company on January 9, 1912, less than a month after the appointment of the Examiner in the then pending case, passed a resolution to the effect that "it would be advisable for the Board of Directors of the Railroad Company by proper resolution to bring to the attention of the Lehigh Valley Coal Company" the question of the organization of the Coal Sales Company (2 R., 629). Two days later the Board of Directors of the Lehigh Valley Railroad Company met and passed a resolution to the following effect:

> "Resolved, that the President inform the Directors of the Lehigh Valley Coal Company that the Directors of this Company request them to consider the propriety of organizing a Coal Sales Company such as has been recommended by the Executive and Finance Committee; and further, to consider the propriety of entering into a contract for a limited time and upon terms to be agreed upon with such Coal Sales Company if it be formed for the purchase and sale by the latter of the coal mined, purchased and owned by the Coal Company."

The whole resolution is set out in Government Exhibit 21 (2 R., 629), and it refers to other details of the matter and then the distribution of $6,000,000 as a dividend to the shareholders of the Railroad Company *in cash*, which the stockholder of the Railroad Company might use, if they so desired, in subscribing *pro rata* to the shares of the

new Coal Sales Company, if organized. The resolutions of the Coal Company following this action, wherein they took up the matter and authorized the organization of the Lehigh Valley Coal Sales Company and, next, the making of a contract with it relative to the purchase of the coal, are set forth in Government Exhibit 37 (2 R., 656 and 658). The correspondence which passed between the respective companies is set out in Government Exhibits 30 and 31 (2 R., 636 and 637). The *bona fides* of the whole matter is evident from those papers. The dividend referred to above was paid by the Railroad Company to its shareholders in cash and many of them availed themselves of the privilege of subscribing to the stock of the Sales Company, so that at the time of the trial of this present case a majority in interest of the holders of the Railroad Company's stock were also a majority in interest of the holders of the Sales Company's stock, but the stock of the two companies is held voluntarily by those stockholders. There is not an element in the matter which is designed in any way to keep the majority in interest of the stockholders of the Sales Company in the majority in interest of the stockholders of the Railroad Company, and both stocks are dealt in freely and separately on *different public exchanges*.

No intent to keep the stockholders of the Railroad Company and of the Coal Sales Company the same in interest was ever involved in the proceedings. The Railroad Company offered its stockholders a cash dividend which might or might not be used for subscribing to the stock of the Sales Company. That offer contained an assurance, however, that any stock not taken by the stockholders

of the Railroad Company would be subscribed for by Drexel & Company in the interest, no doubt, of its own clients and customers. In other words, the stock of the Sales Company would be subscribed for by Drexel & Company even if no single share was subscribed for by the stockholders of the Railroad Company. So that there was a possibility, and even a probability, that at the very beginning no Railroad stockholder would be a Sales Company stockholder.

Numerous details bearing upon the entire good faith of the organization and conduct of affairs of the Sales Company and its complete independence of both the Railroad Company and the Lehigh Valley Coal Company are so fully covered in the brief of the Sales Company that they will not be reiterated here. Suffice it to say here that the Sales Company began its business March 1, 1912, and that later all the details of the matter, the resolutions, contract and leases were laid before the Department of Justice, and Attorney-General Wickersham, in his report for the year 1912, referred to the matter as follows:

> "The situation is, therefore, that coal which is shipped over the Lehigh Valley Railroad is mined by the Lehigh Valley Coal Co., all of whose stock is owned by the railroad company, and is sold at the breakers to the Lehigh Valley Coal Sales Co., all of whose stock has been originally issued to and distributed among the stockholders of the railroad company *pro rata*, but which company has separate officers from the railroad company, and separate directors, and whose stock may be sold by the stockholders without regard to their continued holding of stock in the railroad company. By this arrangement both the railroad com-

pany and the coal companies seem to have parted in good faith with title to the coal before transportation begins and it is claimed therefore that transportation is free from the prohibition of the commodities clause as construed by the Supreme Court in 213 U. S., 412. The question will be submitted to the court at an early date."

In January, 1913, the amended bill of complaint in the Second Commodities Clause Case was dismissed upon application by the United States.

Since March 1, 1912, the Lehigh Valley Railroad Company has had no relations with the Lehigh Valley Coal Sales Company except those which necessarily exist between carrier and shipper. Different from the *Lackawanna* case in 238 U. S., in this case there is no contract for the purchase or sale of or dealing in any manner in anthracite coal between the carrier and the shipper. Nor can it be said by the Government that such contract exists indirectly by reason of the relations between the Lehigh Valley Railroad and the Lehigh Valley Coal Company. The Government has wholly failed to prove the unjust allegations made in the Second Commodities Clause Case in respect of the departmental relation between the Railroad Company and the Coal Company, and also wholly failed to prove the allegations in the same respect made in this case. The averments of the petition in this case in respect of the departmental relationship were simply a repetition of *some* of those made in the Second Commodities Clause Case. Hough, *J.*, in the Court below, found (Finding 6, 225 Fed. 399, 404) that the allegations made in the Second Commodities Clause Case were fully denied and have

never been proved, but, "if they were true prior to March 1, 1912, they are now immaterial", which finding, of course, was predicated upon the theory of the decision in the *Lackawanna* case that a sales contract might even be made between the Coal Sales Company and the Railroad Company itself. But, as said above, this case presents a sales contract made between the Sales Company and the Lehigh Valley Coal Company, a corporation separate and distinct in organization and management from the Railroad Company. The Lehigh Valley Coal Sales Company, therefore, is much more considerably removed in interest from the Lehigh Valley Railroad than was the shipper removed from the carrier in the *Lackawanna* case. There have been complaints that the Railroad discriminated in favor of the Sales Company; these complaints, as heretofore shown, have been dismissed and found by the Interstate Commerce Commission to be without basis. So far as the transportation of anthracite, therefore, is concerned, the two companies have been shown to have no other or different relationship than that existing between any of the numerous other shippers of anthracite and the Lehigh Valley Railroad Company.

III. The joint ownership of stock does not constitute an interest, direct or indirect, within the meaning of the Commodities Clause.

There has been no proof in this case that the so-called "departmental theory" of the second Lehigh Valley Case in 220 U. S. applies in any form

to the relations between the Railroad Company and the Lehigh Valley Coal Sales Company. Also, it must be taken as admitted that the Lehigh Valley Coal Sales Company buys its coal at the mines f. o. b. and that title there passes. The law on this case is, therefore, to be found in the First Commodities Clause Case, 213 U. S., 366, and the Lackawanna Case, *U. S.* vs. *D. L. & W. R. R. Co.*, 238 U. S., 516, in which case it was said at page 526:

> "1. But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a Corporation in which the Road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a Corporation whose stock was held by those who owned the stock of the Railroad Company.
>
> * * * * *
>
> "Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances in which the law recognizes *that there may*

be diversity of corporate interest even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review."

In the court below in this case, the Court expressed itself to the effect that in respect of a comparison of the situation of the Lehigh Valley Railroad Company compared with that of the D. L. & W. Railroad Company under the Commodities Clause, "if there be any material differences, they tend to strengthen the position of the Lehigh." *U. S.* vs. *Lehigh Valley R. R. Co. et al.*, 225 Fed., 400.

IV. The carriage of the Coal of G. B. Markle Company.

The Government raised in the Court below (and apparently raises the same point in its Brief in this Court, p. 140, last paragraph of Note 1) a question as to the carriage of the coal of G. B. Markle Company by the Lehigh Valley Railroad Company, alleging that it is a violation

of the Commodities Clause. The point is not raised in the petition and was not an issue in the trial of the case. But for the information of the court it may be said that the contract between the G. B. Markle Company and the Lehigh Valley Coal Company, attached to the Government's petition as Exhibit 1, shows that there has never been a sale of the coal to the Lehigh Valley Coal Company. Every clause of it reflects the intention of the parties that the coal was simply handled upon commission, and Mr. John Markle, President of the G. B. Markle Company, testified that the coal had always been so handled thereunder (R., 1590). Secondly, irrespective of whether there was a sale of the coal to the Lehigh Valley Coal Company or not, there has never been even a respectable semblance of proof in this case that corporate distinctions were ever at any time obliterated between the Lehigh Valley Railroad and the Lehigh Valley Coal Company, or that the latter was ever at any time an instrumentality or department of the railroad. Thirdly, since March 1, 1912, the coal of G. B. Markle Company has been handled upon a commission basis by the Lehigh Valley Coal Sales Company, as shown clearly by the testimony of the officers of the Sales Company and the testimony of Mr. Markle. Fourthly, irrespective of whether it was handled on a commission basis or not, *i. e.*, even assuming that it was sold to the Sales Company at the mines, the Railroad Company has no interest therein during the time of transportation for the reasons already set forth in respect of the carriage of the Sales Company's own coal.

The finding of the Court below, which may be

said to cover this as well as the charges brought in the petition itself, was as follows:

> "(5) Since March 1, 1912, the Lehigh Valley Railroad Company has transported no coal (not necessary for its own operation) wherein it had any interest direct or indirect within the meaning of existing statutes" (225 Fed. 399, 404).

The decree of the Court below should be affirmed.

JOHN G. JOHNSON,
EDGAR H. BOLES,
Solicitors for Lehigh Valley Railroad Company, Delaware, Susquehanna and Schuylkill Railroad Company, and the individual defendants.

Appendix.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

(225 Fed. 399.)

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY, LEHIGH VALLEY COAL SALES COMPANY, COXE BROTHERS AND COMPANY, INC., DELAWARE, SUSQUEHANNA AND SCHUYLKILL RAILROAD COMPANY, NEW YORK AND MIDDLE COAL FIELD RAILROAD AND COAL COMPANY, THE G. B. MARKLE COMPANY, GIRARD TRUST COMPANY, EBEN B. THOMAS, LYMAN D. SMITH, EDWARD T. STOTESBURY, DANIEL G. REID, CHARLES STEELE, ABRAM NESBITT, GEORGE F. BAKER, GEORGE F. BAER, EDWARD B. SMITH, WILLIAM H. MOORE, EDWARD S. MOORE, WILLIAM R. BUTLER, HENRY B. COXE and FRED M. KIRBY,
Defendants.

In Equity.
No. 11-129.

Final hearing in Equity; action for alleged violation of the "Sherman Act", and of the "Commodities Clause" of the Act of June 29, 1906.

The ATTORNEY GENERAL, represented by THURLOW M. GORDON and ARTHUR W. MACHEN, Jr., Esqrs., for plaintiff;

JOHN G. JOHNSON, Esq., and E. H. BOLES, Esq., for Lehigh Valley Railroad Co. *et al.*;

F. W. WHEATON, Esq., for Lehigh Valley Coal Company; and Coxe Bros. & Company, Inc., *et al.*;

EVERETT WARREN, Esq., for Lehigh Valley Coal Sales Co.

JOHN HAMPTON BARNES, Esq., and SILAS W. HOWLAND, Esq., for Girard Trust Co.

E. V. B. GEITY, Esq., for G. B. Markle Co.

HOUGH, *D. J.*

This suit is but one chapter in a litigation against anthracite coal owners and carriers, which has now extended over many years, and become historic. The earliest chapter requiring notice is the "First Commodities case" (*United States* vs. *Delaware & Hudson Co., et al.*, 164 Fed. Rep., 215; on appeal 213 U. S., 366); next came the "Second Commodities case" (*United States* vs. *Lehigh Valley Railroad Co.*, 220 U. S., 257), and finally the Lackawanna Coal Sales case (*United States* vs. *Delaware, Lackawanna & Western R'y*, 213 Fed. Rep., 240).

At page 249 of 213 Fed. Rep., it is said: "We understand that (a new action against the Lehigh Railroad) has recently been brought in the Second Circuit";—this is the cause referred to.

The District Court is not a parade ground wherein a review of the evidence and arguments may be taken before this action joins the Lackawanna Coal Sales case on the docket of the Supreme Court. Therefore the statement of facts and summary of litigated questions will be largely made merely by reference to the reports above enumerated.

In the Lackawanna case (213 Fed. Rep., at 263) it is said "the bill of complaint also makes a formal charge • • • under the anti-trust act; but the oral argument left us under the impression that this charge was not much insisted upon."

This statement of McPherson, *J.*, marks the only substantial difference that I can discover between this litigation and the one in which he wrote.

The bill herein charges violations, both of the "Sherman Act" and the "Commodities Clause", but the extended arguments are addressed almost wholly to the anti-trust feature of the litigation.

So far therefore as the Commodities Clause is concerned I shall dismiss it with the statement that there is no great difference between what the Lackawanna Railway did and was upheld in doing by all the Circuit Judges of the Third Circuit, and what the Lehigh Valley Railroad has been doing as shown in this case.

If there be any material differences they tend to strengthen the position of the Lehigh as compared with that of the Lackawanna. For the Lackawanna owned outright much if not most of the coal long transported over its own lines; whereas the Lehigh Valley owned the stock of other corporations which under the laws of Pennsylvania had good right to own the lands and mine and sell the coal the transportation of which has given rise to so much litigation. I do not myself think that this difference is substantial. Without further discussion, it is held that nothing in the bill charged, constitutes a violation of the "Commodities Clause", if the decision in the Lackawanna Coal Sales case is right,—and that I am not concerned to question.

While the tone of complainant's argument on

the "Commodities clause" is well illustrated by an italicized assertion in the brief that "the court (in the Lackawanna case) wholly ignored the most vital provisions in the whole contract", and the decision (of three Circuit Judges) is merely that "of a court of coördinate jurisdiction and in a different circuit, (and) of course in no way binding upon this court";—it is not overlooked that an endeavor has been made to distinguish the Lackawanna suit from this action.

It is asserted that the Coal Sales Company has received and is receiving "discriminating favors from the" other principal defendants.

This means that the Sales Company has an annually diminishing allowance made it by the Coal Company to encourage the introduction of Lehigh coal in regions where business is presently unprofitable, and has been permitted to buy coal in storage at very low rates; while the Railroad Company has at inadequate rentals leased to the Coal Sales Company certain "storage plants".

From the assertion that these arrangements are undue favors, is drawn the inference that there is a lack of good faith in the creation of the Coal Sales Company which shows that that corporation is but the *alter ego* of the Coal Company, which itself is but the creature of the Railroad Company; —wherefore the law is still infringed.

The suggestion or argument, when examined, amounts to this,—that when by the creation of coal sales companies of which no share of stock belonged to the Lackawanna or Lehigh Railroads, those corporations sought to comply with modern law, it was their duty severally to have no relation whatever with the new companies, except to collect freight charges.

But the Lehigh Valley Railroad owned certain lands useful only for storing coal; the Coal Company had certain coal on hand, and the plan of an independent Sales Company was new. What should or could be done with the lands and coal on hand, and how could the concern retiring from the selling business ensure the creation of a strong and pushing successor? Certainly not by hostility. Who would or could buy the coal on hand and occupy and use the storage plants except the Coal Sales Company? But (says complainant) the prices were ridiculously low. Answer is justified that (1) the assertion is untrue, and (2) it was praiseworthy and lawful at first to sacrifice much in price when the object was to save from further assault the business of selling coal after interstate transportation;—a business that had become precarious owing to modern economics as asserted in statutes and interpreted by the courts.

The differences suggested between this and the Lackawanna case seem to me wholly unsubstantial. Upon the anti-trust side of this case no extended discussion of facts is necessary. There is little conflict about facts,—in the sense of visible phenomena.

But some analysis of the bill may assist in presenting the theory upon which this suit has been promoted. It is asserted that substantially all of the defendants (except the Girard Trust Company and the G. B. Markle Company)* have combined

*The Girard Trust Company is a defendant solely because it is the trustee of certain bonds which might be injuriously affected by granting the prayers of the bill, and the Markle Company is a party because it long ago made an agreement for a term of years by which the Lehigh Railroad exclusively transports the Markle coal, and the Lehigh Coal Company (and now the Coal Sales Company) became the exclusive selling agent for said coal at prices fixed by Markle.

to restrain and monopolize, and have been monopolizing "the production, transportation and sale in interstate commerce of anthracite coal from lands located along the lines of the Lehigh Valley Railroad".

The method of monopoly and restraint is said to have been by "acquiring control of the output of independent producers by exerting the power of the Lehigh Valley Railroad as a carrier to give undue preferences and advantages to the coal producing and trading companies controlled by it and to discriminate against their competitors".

The result of this process is said to be that the "monopoly of the ownership and production of anthracite coal, exercised through subsidiary corporations under its control" has enabled the Lehigh Valley Railroad to prevent "the building of any new railroad in the portion of the anthracite regions served by it, and has kept independent producers under the disadvantage of having to ship over a railroad *also engaged in the coal business*".

The italicized portion of the last sentence is most important,—for what is meant by engagement in *the coal business?* The bill, the kind of evidence offered and the arguments in support, all really assume that by "coal business" is meant the operations, united in interest and centralized in control, of mining, shipping, transporting and selling anthracite coal.

It has already appeared that if the Lackawanna Coal Sales case is to be followed it must be held that the Lehigh Valley Railroad has not since the filing of this bill or for some time before, been engaged at all in the selling of coal to the consumer. It must therefore follow that when the Government

still insists upon the existence of monopoly and restraint of trade, such offensive conduct must be found in an identity of interests between a coal-carrying corporation and coal-owning and mining companies.

But it must also be remembered that the mere fact of such union in interests as manifested by a stock ownership is not unlawful, provided there is a "dissociation in good faith", between "*bona fide* corporations".

On this point counsel for the Government have submitted the proposition that the phrases "dissociation in good faith", and "*bona fide* corporations" as used in the opinons of the Supreme Court, do not refer merely or chiefly to the honesty or morality of the transactions, so that when they deny "dissociation in good faith" no reflection is thereby made upon the integrity of those concerned in the transaction.

In other words a body of men may be honest, moral, well-intentioned and acting within the letter of the law, and yet be unable to resist conviction of monopoly and restraint of trade because they cannot in "good faith", "dissociate" the corporations which they control. The proposition is incredible;—to my mind "dissociation in good faith" requires no more than the lawful conduct of honest men.

Many hundreds of pages of the testimony herein is summed up in the "First Commodities case", 164 Fed. Rep., at 222. What Gray, *J.*, there stated is still true, and no more detailed reference will be made to the history and development of the Lehigh Valley Railroad and its controlled companies. In

order to show monopoly and restraint evidence has been adduced to prove that:

1. For many years before 1912 the coal mining and selling business of the Lehigh Valley Coal Company was either absolutely unprofitable or would not have been profitable if that corporation had not been secretly, unduly and unlawfully favored in the matter of freight rates.

2. Such favors took the form of the Railroad Company's furnishing at low rates terminal and storage facilities and making advances of money either without interest or at rates far below what was reasonable under the circumstances.

3. Producers and shippers of coal from lands neither owned nor controlled by any defendant corporation complained of such discriminatory treatment and proved before the Interstate Commerce Commission that their grievances were well founded.

4. The Lehigh Valley Railroad was one of the defendants in *United States* vs. *Reading Co.* (226 U. S., 24), and has therefore been conclusively shown as a conspirator striving to prevent the construction of another railroad which might afford an outlet for anthracite in addition to the lines of the defendants in that suit.

As to all of the above contentions I decline to make any definite finding, because I regard the evidence as immaterial to existing conditions. All of the matters referred to took place before the creation and entry into business of the Lehigh Valley

Coal Sales Company, and assuming all the allegations to be true, it is thought that even in an action under the Sherman Act an opportunity might well be afforded (as in criminal proceedings) for a *locus penitentiæ*.

The following propositions of law I regard as applicable to this case and the enumerated statements of fact as material to the judgment to be pronounced:

1. Ever since the Lehigh Valley Railroad emerged (more than half a century ago) from the throes of establishing any business at all, it has sought to acquire control (mostly through the Lehigh Valley Coal Company) of a considerable portion of that limited region in the State of Pennsylvania, which so far as is known contains substantially all the anthracite coal in the world.

2. Either by outright purchase, or by acquisition of the stock of (especially) Coxe Bros. & Company, this process had so far succeeded that in the year 1912 (and just before the formation of the Lehigh Valley Coal Sales Company) the Lehigh Valley Coal Company owned or controlled rather less than 13% of the nearly contiguous mining regions in Pennsylvania known as the Wyoming, Lehigh and Schuylkill. That acreage represented a little less than 27% of the coal lands naturally and conveniently tributary to the lines of the Railroad Company. Of all anthracite coal transported by all carriers the Lehigh Railroad was then carrying about 18%, and of that percentage approximately four-fifths came from mines owned or controlled by the Lehigh Valley Coal Company or was produced through such exclusive transportation contracts as had been made with the Markle Company.

3. The Lehigh Valley Coal Company has from its creation done as it was ordered to do by the Lehigh Valley Railroad, and under such direction has bought, leased or otherwise acquired control of coal lands. The purpose of this acquisition on the part of the Lehigh Valley Railroad was to get and firmly keep the business of carrying the coal extracted from those lands.

4. The Lehigh Valley Railroad Company does not now and has not since March 1, 1912, owned any shares in any company selling coal beyond the limits of Pennsylvania. It does own and for many years has owned all the shares of companies which now own and mine coal and sell it in Pennsylvania f. o. b. pit mouth. The same companies before March 1, 1912, sold the coal so mined in many States of the Union after transportation of the same by Lehigh Valley Railroad Company.

5. Since March 1, 1912, the Lehigh Valley Railroad Company has transported no coal (not necessary for its own operation) wherein it had any interest direct or indirect within the meaning of existing statutes.

6. The allegations of the bill of complaint permitted as an amendment by the Second Commodities case were fully denied and have never been proved;—but if they were true prior to March 1, 1912, they are now immaterial.

7. At the time this bill was filed the regulation of freight rates (including joint rates) for interstate transportation was and still is committed to the Interstate Commerce Commission. No charge

of violation of law in respect of rates existing when bill filed or arising since has been proven.

8. The charge in the bill that freight rates for coal carried were made unreasonably high for the purpose "of injuring independent producers of anthracite", and of forcing them either to sell their mines * * * or enter into contracts for the sale of their output" is not proven;—nor is there any such allegation as to existing freight rates or rates existing at the time of bill filed.

9. The mere creation, maintenance and extension of the composite business of owning, mining, transporting and selling coal has long been not only legal but laudable within the State of Pennsylvania,—and is so still.*

10. Equitable decrees have occasionally been used as epitaphs or means of preventing the resurrection of obnoxious practices (*United States* vs. *Trans-Missouri Freight Ass'n*, 166 U. S., 290:—but they normally speak in the present tense and are applied to remedy existing evils and not to characterize or condemn past wrongs.

Assuming for argument's sake the correctness of the foregoing, upon what foundation does the complainant's case rest?

The theory is compendiously shown by the following extract from the brief submitted:

"Carrier analogous to a Judge."

"The truth is, where a common carrier, charged with the semi-judicial duty of hold-

*This proposition is rested without further discussion on the statement of Gray, *J.*, in 164 Fed. Rep., 224, as quoted in 213 U. S., 402. It might have been made after an examination of the testimony in this case.

ing the scales even between various shippers who compete with one another, and of rendering impartial service to all alike, proceeds to buy up the business of some of these competing shippers, the case is as if a judge upon the bench should proceed to buy up the claims of some of the litigants in his court. The one practice restrains trade and fosters monopoly as much as the other would hinder justice and promote corruption."

This delightful *argumentum ad judicem* shows that what is really complained of is the bald fact that the Railroad Company, by owning the stock of various coal companies, controls and practically owns so much anthracite coal that it cannot be trusted to deal fairly with the rest of the world in the matter of transportation charges, which matter the judicial branch of our Government is not content to leave to the regulation of another governmental agency, viz: the Interstate Commerce Commission.

It cannot be charged, and is not asserted in argument, that monopoly exists because of the control of so small a portion of anthracite acreage as has been stated above; nor yet in the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers. So there is found in the very large proportion which the coal from the Lehigh lands bears to all the coal carried by the Lehigh Railroad, a monopoly within the "territorial unit" consisting of the lands presently reached by the Lehigh Railroad.

This doctrine of territorial unit is a novelty which I do not think bears investigation; for all that it does or can amount to is this (under existing decisions): The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an

actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce; for said relations begin, exist and end within the limits of the State of Pennsylvania, and are there entirely legal.

The foregoing discussion of the "anti-trust" portion of this bill, has resulted rather from the vigorous confidence of counsel than from any perception on my part of its difficulty.

If the Lackawanna case is to be followed, and any violation (at or since time when bill filed) of the Commodities Clause denied,—there is no life left in this action,—unless the meaning of the well worn phrase "interstate commerce" is to receive fresh enlargement. Complainant's evidence and arguments consist largely in an iteration of alleged wrongs committed in those far-off days when the same entity could mine, transport and sell its own coal without encountering governmental interference. So great were those wrongs,—it is said,—that even though transportation and ownership be now fully divorced in "good faith",—their recurrence can only be effectually prevented by finding monopoly and restraint in any ownership by a carrier of potential tonnage,—which is undoubtedly the railroad way of regarding unmined coal.

But it is still true that to violate the Sherman Act there must be monopoly or restraint of a particular thing,—"*interstate* commerce". Separated from the Commodities clause, the same kind of argument would apply to wheat or timber grown on the extensive realty of one of the "land-grant" railroads of the West, and there is at bottom no difference between this argument against the Lehigh Railroad's retention of its coal stocks, and the view

humorously condemned by Justice Brewer in an address well worth remembering.*

This case may be thus summed up. No monopoly of interstate commerce is shown, nor any attempt to monopolize. For the proof of the pudding is in the eating thereof, and it is impossible to find any of the normal results of monopoly without also finding violations of the Comomdities clause,—and none is discovered. As to restraint of interstate trade in coal transported over the Lehigh Road,—there can be no restraint without control, and since the railroad does not control the coal it carries, it has no means of restraint.

Bill dismissed.

Dec. 21, 1914.

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*"The Constitution gives to Congress the exclusive regulation of commerce between the States, as well as between this country and foreign nations; but who can now say, in view of legislation and judicial decision, at what period of time interstate commerce begins, and where it ends? If we listen to the contentions of some we shall be led to believe that when the farmer sows his wheat, having in view the gathering in the fall of a crop of grain which he intends to sell to a mill in some other state, the power of Congress attaches as upon a beginning of interstate commerce and continues until the wheat has been manufactured into bread and eaten by the consumer." (Address before Virginia State Bar Association August 1906.)

Office Supreme Court, U. S.
FILED
OCT 9 1916
JAMES D. MAHER

NO. [redacted]

IN THE

Supreme Court of the United States

October Term, 1916

THE UNITED STATES OF AMERICA,
Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY AND OTHERS,
Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Brief for The Lehigh Valley Coal Company.

Raeder Press, Wilkes-Barre, Pa. 154171

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IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Appellant,
vs.
LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY, *et al.*,
Defendants.

October Term, 1916.
No. 69.

BRIEF FOR LEHIGH COAL COMPANY.

This suit was brought in the District Court of the United States to October Term, 1913.

Its avowed object was "to prevent the defendants from further restraining, monopolizing, or attempting to monopolize trade and commerce in anthracite coal, in violation of the Act of June 2, 1890, and also to prevent defendant, Lehigh Valley Railroad Co., from further transporting in interstate commerce anthracite coal in which it has an interest, in violation of the commodity clause."

(Record, Vol. V, page 6, S. 5.)

The express purpose of the action was to prevent a continuance of alleged existing evils.

From petition to final brief the case of complainant lacks nothing in the way of allegation and assertion.

It is respectfully submitted, and was so found by Judge Hough, that it fails in proof.

The learned Judge of the District Court classifies in four paragraphs those things concerning which evidence was adduced by the complainant "to show monopoly and restraint."

(Record, Vol. V, pages 229-230.)

Without finding that the evidence thus adduced was or was not sufficient to amount to proof, he holds that such evidence is immaterial as to existing conditions, and that the matters referred to took place before the creation and entry into business of the Sales Company, and therefore before this suit was brought.

(Record, Vol. V, page 230.)

Again, and speaking generally, he said, "Complainant's evidence and arguments consist largely in an iteration of alleged wrongs committed in those far-off days when the same entity could mine, transport and sell its own coal without encountering governmental interference."

(Record, Vol. V, page 232.)

Judge Hough recognized "the vigorous confidence of counsel."

(Record, Vol. V, page 232.)

He was constrained, however, by lack of proof to hold, that, "No monopoly of interstate commerce is shown, nor any attempt to monopolize."

(Record, Vol. V, page 233.)

CHARGES OF THE PETITION.

The two principal charges against the Lehigh Coal Company are:

(1) That in and of itself it constitutes a combination in restraint of interstate and foreign trade and commerce and a monopolization of a part of the same in violation of the Act of July 2, 1890; and

(2) That it is a party with all the other defendants named in the Petition, except the Girard Trust Company, to a combination and conspiracy to restrain and monopolize interstate and foreign trade and commerce in anthracite coal, and that said combiners and conspirators are attempting to monopolize and are monopolizing a part of such trade and commerce in violation of said statute.

Taken in connection with the allegation that the Lehigh Coal Company is, and always has been, a mere adjunct, department or instrumentality of the Lehigh Railroad, the charges are:

(1) That the Lehigh Coal Company in and of itself is restraining interstate trade, &c., and exercising an unlawful monopoly over a part of such trade in anthracite coal, to wit: that part which is produced from mines along the lines of the Lehigh Railroad;

(2) That it is exercising the same restraint of trade and monopoly in combination with nineteen other defendants;

(3) That the Lehigh Railroad is exercising the same restraint of trade and monopoly, using the Lehigh Coal Company as a mere instrumentality to that end; and

(4) That the Lehigh Railroad is exercising the same restraint of trade and monopoly in combination with nineteen other defendants.

Extent of Restraint and Monopolization Alleged.

The specific allegation of extent of restraint and monopoly is as follows:

"The defendants other than Girard Trust Company are parties to a combination and conspiracy to restrain and monopolize interstate and foreign trade and commerce in anthracite coal, and are attempting to monopolize and are monopolizing a

part of such trade and commerce, in violation of the Act of Congress of July 2, 1890."

(Petition, p. 4.)

(Record, Vol. V, p. 6.)

The "part of such trade and commerce" in anthracite coal referred to is alleged to be "of anthracite coal from mines and lands located along the lines of Lehigh Railroad."

(Petition, p. 17.)

(Record, Vol. V, p. 13.)

All the other charges against the Lehigh Coal Company are of alleged acts said to be in furtherance of the principal offences.

Statement of Facts.

The Lehigh Coal Company was chartered in November, 1875. It is a separate, independent corporation, with its own officers, to wit: a President, Vice-President and General Manager, Secretary and Treasurer, and General Auditor, selected by its own Board of Directors without domination or control from any outside source.

It has an Assistant General Manager and Division Superintendents, Local Superintendents, Certified Mine Foremen, Assistant Mine Foremen, Fire Bosses, &c., selected by the Vice-President and General Manager, who has absolute charge of the operations of the company, and control of its mines and mining.

It has departments of Mining Engineering, Mechanical Engineering, Electrical Engineering, Real Estate, Efficiency and Safety, Auditors of Operations, Paymaster, Bookkeepers, Clerks, &c.

It has thousands of employees in other capacities, such as miners, laborers, drivers, door tenders, slate pickers, carpenters, stable bosses, blacksmiths, locomotive and stationary engineers, and firemen, &c., &c., and not a single officer, or superintendent, or head of a department, or employee of any kind, has any connection whatever with the Lehigh Railroad Co., except only the President.

It hires its own officers and employees and pays them out of its own funds.

It keeps its own separate books of account, covering all its transactions, and its accounts are of its own affairs, and are in no way intermingled with the accounts or affairs of the Lehigh Railroad Co.

Its accounts are audited by its own auditors.

Its funds go into the hands of its own Treasurer, and are deposited in its own separate bank accounts, and are in nowise mingled with the funds of the Lehigh Railroad Co.

It pays taxes upon its lands held in fee or by lease, and upon its coal mined, with its own funds, and its taxes are in no way mingled with the taxes of the Lehigh Railroad Co.

It rents it own offices, which are entirely separate and apart from any office of the Lehigh Railroad Co., and pays the rent out of its own funds.

At Wilkes-Barre, which is the headquarters of its operating department, it owns its office building in fee, in which are located all its departments and departmental heads, having charge of its mines and mining operations, its auditors, keepers of accounts, &c., and there is no one in that building who is not in the sole employment of the Lehigh Coal Co., with the single exception of its legal department, in which its General Counsel is at liberty to engage also in private practice.

The "affairs" of the Lehigh Coal Co. are clearly those things which are done in connection with the business which it is authorized to carry on by the terms of its charter, and is carrying on within those terms.

They are kept absolutely separate and apart from the affairs of any other corporation.

From its beginning down to the present time, its growth has been steady and normal.

By a comparison of its production in 1890 and again in 1895 with its production in 1912 and 1913 the argument is made that the increase of production thus shown is due in part to the purchase by the Coal Co. of the stock of a large number of previously independent companies, and in part to

purchases or leases of additional acreage of coal lands.

(U. S. District Court.)
(Govt. Brief, page 41.)
(Brief for U. S., page 12.)

This argument is so expressed as to seem to carry with it the assertion that all of the increase of the production of the Lehigh Coal Co. is accounted for in the two items named, that is, out of new acquisitions, and its purpose is to show monopolistic acquisition, and not normal growth.

The argument omits altogether any consideration of increased production arising from the normal and skillful development and working of properties owned and leased by Lehigh Coal Co. and not included in either of the classes of acquisition referred to in the Govt. Brief, (page 41).

To illustrate, the Prospect Colliery of the Lehigh Coal Co., which is one of its original properties, produced in 1912 more than a million tons of coal, which was almost equal to the total production of the Lehigh Coal Co. in 1890 from all sources, and not a pound of this coal came from any acquisition of coal or coal lands by the Lehigh Coal Co., either by stock purchase, or by purchase or lease of coal lands between 1890 and 1912.

It was due to the proper and skillful development of a property which had been acquired by

lease by the Lehigh Coal Co. many years prior to the passage of the Sherman Act.

In 1890 this property produced 246,000 tons of the 1,464,509 tons referred to in the Govt. Brief —page 41,—so that its production in 1912, and it was still larger in 1913, accounts for nearly a million tons of the 5,260,254 tons, which is the increase in production of Lehigh Coal Co. as between the output of 1890 and the output of 1912, as the Government makes up the figures.

The coal produced by Lehigh Coal Co. in the year 1912, from properties acquired by it prior to 1890, exceeded the total output of 1890 from the same property, by over two millions of tons (2,000,000) and not a pound of that coal was derived from any acquisition since 1890, but all of it was the result of the application of skillful methods of mining and handling and preparation of coal dug out of the lands which the Lehigh Coal Co. had acquired prior to the passage of the Sherman Act.

Out of the five and a quarter millions of tons of increased production between 1890 and 1912, which the Government attributes entirely to abnormal acquisitions of coal properties, after 1890, about two and a quarter millions of tons came from no such sources, but were produced as the result of hard work and good financial and business methods applied to the mining from tracts of land which were acquired by Lehigh Coal Co. prior to 1890.

The power of the Lehigh Coal Co. to acquire additional coal lands is practically at an end.

It has no power to increase its production to any appreciable extent.

While some of its operations are now at the maximum of production, many are on the wane, and some are nearing exhaustion.

With exhaustion comes the attendant loss of improvements, both inside and outside the mine.

The area of anthracite lands is limited, its extent has been defined by skilled engineers of the State and of the United States.

The business cannot be carried on except by exhaustion and destruction of the commodity itself, which is not a renewing thing, and is something which cannot be manufactured.

All the anthracite lands have been bought or leased, and extensive mining has been carried on now for fifty years or more, and has greatly lessened the amount of the commodity.

No virgin tracts of coal land are now procurable.

No virgin tract of coal lands has been sold in the Wyoming region for many years except occasionally under a house lot, containing a small fraction of an acre.

For purposes of taxation, coal lands containing all the veins are valued in Luzerne County—the center of the Wyoming region,—at nine thousand dollars per superficial acre.

It is physically impossible, therefore, for Lehigh Coal Co. to appreciably increase its acreage or tonnage.

(Record, Vol 3, 1476-1590.)

If the Lehigh Coal Company is a menace, "in and of itself," as the Petition alleges, or if it is a mere nonentity, without the power to be anything, "in and of itself," as the Petition also alleges; or if it is a "parasite" or a "tool" or an "instrumentality" of Lehigh Railroad, which the Petition also alleges, there is no physical power which it can exert by itself or with others by which it can ever appreciably increase its holdings of coal lands, or its control of anthracite coal.

No attempt has been made to prove many of the allegations of the Petition.

In such cases this defendant assuming the burden, which properly belongs to the Petitioner, has disproved such allegations.

For example, that the Lehigh Coal Co. is acting as the selling agent of the G. B. Markle Company to secure the transportation of that coal to Lehigh Railroad (Petition, p. 37) (Record, Vol. V, p. 24), notwithstanding the fact that the learned Counsel,

who drew the Petition, knew, and alleged in the Petition, that under an exclusive sales agency all the G. B. Markle Company's coal was being marketed by Lehigh Coal Sales Company (Petition, p. 8) (Record, Vol. V, p. 8), and that the Lehigh Coal Sales Company "is also the exclusive selling agent for the G. B. Markle Company."

(Petition, p. 60.)

(Record, Vol. V, p. 38.)

That the Lehigh Coal Company "is engaged in mining and purchasing anthracite coal, and in shipping and selling the same in interstate commerce" (Petition, p. 6) (Record, Vol. V, p. 7.), when it could have been easily ascertained, as the undisputed proof shows, that the Lehigh Coal Company has not bought a pound of anthracite coal since May 26, 1913, and has not sold or shipped a pound of anthracite coal outside the State of Pennsylvania since March 1st, 1912.

That somehow or in some way the Lehigh Coal Company was tarred with the old sixty and sixty-five per cent. contracts, when it was well known that the Lehigh Coal Company obeyed immediately, absolutely and without taking any exception thereto, or claiming any exemption therefrom, the decree of the United States Court for the Eastern District of Pennsylvania, entered May 26, 1913, annulling such of said contracts as were then in existence, and since that time had never taken a pound of coal under one of those contracts.

The allegation in the Petition (pages 27, 28, 29) (Record, Vol. V, p. 18-19) concerning the Temple Iron Company matter that the Lehigh Coal Company thus avoided, through the conduct of others, some competition from independent operators, to sustain which not a syllable of proof was offered, and none could have been found, because it is not the truth.

The allegation, that the Lehigh Railroad Company "caused the Lehigh Coal Company to enter into a contract with G. B. Markle and Company," (later the G. B. Markle Company), (Petition, p. 37) (Record, Vol. V, p. 24), the contract referred to being Ex. No. 1, attached to Petition.

The allegation that the intent of the Lehigh Coal Company in making this Markle contract was to monopolize the transportation and sale of anthracite coal along the lines of the Lehigh Railroad and to secure the transportation thereof almost exclusively to the Lehigh Railroad, thereby preventing competition, when the contract shows on its face that the G. B. Markle Company had the right to ship its coal over any railroad it saw fit, or by any suitable method of transportation which it might select, and the undisputed proof is that it availed itself of that right whenever it saw fit.

(Petition, p. 81 (83).)
(Record, Vol. V, p. 50.)
(Record, Vol. 3, p. 1592.)

An examination of the evidence in behalf of the Government will disclose that it has not proved

any allegation of fact against the Lehigh Coal Company which that company has denied in its answer.

The material allegations referred to are as follows:

(1) That the Lehigh Coal Company ships and sells anthracite coal in interstate commerce.

No attempt to prove this.

Denied and disproved.
(Record, Vol. 3, pages 1611-1612.)
(Record, Vol. 1, page 345.)

(2) That Lehigh Coal Company buys coal to ship to market.

No attempt to prove this.

Denied and disproved.
(Record, Vol. 3, page 1612.)

(3) That Lehigh Coal Company "takes over" the coal of Cove Brothers and Company, Incorporated.

No attempt to prove this.

Denied and disproved.
(Record, Vol. 3, page 1612.)

(4) That in the acquisition of its coal lands, etc., it was unlawfully or unduly or improperly dominated by the Lehigh Railroad Company.

No attempt to prove this beyond the admitted fact as to stock-ownership.

Denied and disproved.
(Record, Vol. 3, page 1612-1613.)

(5) That these acquisitions were not made by the Lehigh Coal Company as a separate, independent and bona fide corporation in the normal course of its business.

No attempt to prove this beyond the admitted fact as to stock-ownership.

Denied and disproved.
(Record, Vol. 3, page 1613.)

(6) That the Lehigh Railroad Company caused the Lehigh Coal Company to execute the G. B. Markle Company contract of December 30, 1889 (Government Exhibit No. 1), for the purpose of monopolizing transportation and sale of anthracite coal along the lines of the Lehigh Railroad.

No attempt to prove this.

Denied and disproved.
(Record, Vol. 3, page 1590.)

(7) That the intent of the G. B. Markle Company contract was to secure to the Lehigh Railroad the "almost exclusive" tonnage of the coal covered by it.

No attempt to prove this.

Denied and disproved.

(Record, Vol. 3, pages 1590-1595.)

(8) That the Lehigh Coal Company is selling the coal of G. B. Markle Company.

No attempt to prove this.

Denied and disproved.

(Record, Vol. 3, page 1615.)

Every allegation of specific fact against the Lehigh Coal Company denied by it in its answer, must therefore be found in favor of the Coal Company.

(1) Because the Government has made no attempt to prove it; and

(2) Because the Coal Company has disproved each of such allegations.

This, of course, does not refer to those general allegations of the Petition which are conclusions of the Government, arising from mixed questions of fact and law, but it does apply to every allegation of fact not admitted by the Lehigh Coal Company from which the Government attempts to deduce such conclusion.

For example: The Petition alleges that the Coal Company is an unlawful combination in itself.

Every specific fact upon which this charge rests denied by defendant Coal Company having been disproved, the charge must stand or fall upon the admissions of the defendant.

The Petition alleges unlawful conspiracy and combination with other defendants.

Every specific fact upon which this charge rests denied by defendant Coal Company having been disproved, this charge also must stand or fall upon the admissions of the defendant.

The Petition alleges that defendant Coal Company is not a bona fide corporation, but a mere adjunct to, or department of the Lehigh Railroad, and there being no specific proof of the allegation, this charge also must stand or fall, in the face of express denial by testimony, upon the admitted relations between the Lehigh Coal Company and the Lehigh Railroad Company.

Upon this basis, therefore, coupled with the proof by it of the counter-allegations contained in its answer, the case against the Lehigh Coal Company must be determined.

Admissions.

Now, what are its admissions?

(1) That it is a corporation organized under the laws of the Commonwealth of Pennsylvania, November 13, 1875, authorized to own and lease

coal lands and operate coal mines in said Commonwealth, and to buy, sell and otherwise deal in anthracite coal generally.

(2) That its general office is in Philadelphia, and it has offices for its General Auditor and Secretary and Treasurer at 143 Liberty Street, New York City.

(3) That its outstanding capital stock is $1,965,000—par $50.—which, except qualifying shares, is owned by the Lehigh Railroad Company.

It may be noted, in passing, that neither by its charter, nor by the laws of Pennsylvania, are its directors required to own any of its stock.

(4) That its funded debt is about $20,296.-000.00, and its assets about $35,000,000.00.

(5) That it holds in fee and by leases about 54,229 acres of land in Pennsylvania, of which 24,748 acres are located along the lines of the Lehigh Railroad Company and contain varying quantities of varying quality of anthracite coal.

(6) That the Lehigh Sales Company was incorporated in New Jersey and buys, ships and sells anthracite coal, buying all of defendant Lehigh Valley Company's coal at its mines in the State of Pennsylvania, except a small quantity which is sold at the breakers to employees of Lehigh Coal Company for their personal consumption.

(7) That Coxe Brothers and Company, Incorporated, is a corporation of Pennsylvania, mining and selling anthracite coal. It admits the location of its office, and the amount of its outstanding capital stock, and its acreage of fee and leased lands, with the portion thereof located along lines of the Lehigh Railroad Company.

(8) It admits the allegations of the Petition as to the incorporation of the New York and Middle Coal Field Railroad and Coal Company, and the location of its office, and its fee ownership of coal lands.

(9) It admits the allegations of the Petition as to the incorporation of G. B. Markle Company, and that said company sells its entire output to Lehigh Coal Sales Company.

(10) It admits its alleged acquisition of coal lands, collieries and mining businesses.

(11) It admits that in 1905 Coxe Brothers and Company, Incorporated, was a large producer of anthracite coal, and that its collieries are along the line of the D., S. & S. R. R., and that five of its directors are also directors in the Lehigh Coal Company.

(12) It admits the existence of the D., S. & S. R. R.

(13) It admits the decree of the U. S. District Court of May 26, 1913, annulling the then existing sixty-five per cent. contracts.

(14) It admits that it never paid a dividend, and that in some years prior to 1902, it has lost money.

(15) It admits that prior to 1903 it borrowed money from Lehigh Railroad Company.

(16) It admits the substantial correctness of the financial statement set out in the Petition in sub-division 8 (a) of paragraph V.

(17) It admits that it has at times leased portions of its coal lands to other operators.

(18) It admits that it has leased coal yards, trestles and storage facilities to dealers in anthracite coal, stipulating that said dealers buy exclusively or in specified large quantities from defendant.

No such leases have existed since March 1, 1912.

(19) It admits that it has always paid the published freight rates during the time it was a shipper of coal.

(20) It admits entering into the contract of March 1, 1912, (Government Ex. No. 3).

Counter Allegations.

What are the Lehigh Coal Company's counter allegations, which have been proved in this case?

(1) It denies that it ships or sells any anthracite coal in interstate commerce, and alleges that it sells all its coal within the Commonwealth of Pennsylvania, at its mines and there delivers it to the vendees, and ships no anthracite coal whatever.

(2) It buys no coal for re-sale.

(3) That the total acreage of coal lands held by it, in fee and by lease, is about 10 per centum of the total acreage of anthracite coal lands in the districts in which the Lehigh Coal Company's coal lands lie.

(4) That the total acreage of coal lands held by it, in fee and by lease, is about 22 per centum of the total acreage of anthracite coal lands lying along the lines of the Lehigh Railroad Company, and naturally and conveniently tributary to said railroad.

(5) That in terms of tonnage the total number of tons of anthracite coal produced by it annually is about one-tenth of the total anthracite tonnage produced in the districts where it operates, and that it is about one-fifth of the total of said tonnage produced along the lines of the Lehigh Railroad and naturally and conveniently tributary to it for

transportation. In connection with the general charge of unlawful monopoly against the Lehigh Coal Company it should be borne in mind that the Lehigh Coal Company has no operation whatever in the anthracite producing counties of Dauphin, Sullivan and Susquehanna, and the proportion of its acreage and production is confined to the districts in which it operates.

If a comparison were made between its acreage and production, and the total anthracite acreage and production in Pennsylvania, its part would be very much less than one-tenth.

(6) That it made money under its few sixty-five per cent. contracts, which is not very material, for

(7) It promptly and absolutely and without taking any exception or seeking any exemption, complied with the decree of May 26, 1913.

It may be noted, in passing, that of its sixty-five (65) per cent. contracts existing at the time of the adjudication of the Supreme Court, six in number, four could have been exempted from the decree upon the same grounds upon which exemptions were allowed by this Court. (See Record, 695 and 697), to wit: that the contracts covered only its own coal which had been leased by it.

Its prompt acquiescence with the decree, and its failure to ask for exemptions to which it was

properly entitled, would seem to negative the assertion of the Government that it "unwillingly" relinquished its 65 per cent. contracts.

(8) That the Markle contract of December 30, 1889 (Government Ex. No. 1), was executed in good faith, for legitimate business reasons.

(9) That under it the G. B. Markle Company had the right to any method of transportation it saw fit.

(10) That since March 1, 1912, the Lehigh Coal Company has had nothing to do with the contract.

(11) That the mining, and preparing and selling of anthracite coal is a business of more than ordinary financial hazard and risk, particularly where it is carried on, as in this case, by an operator which is to a large extent a lessee, and that where the Lehigh Coal Company has lost money it has been because of a legitimate business reason.

(12) That the financial transactions between the Lehigh Coal Company and the Lehigh Railroad Company were bona fide and legitimate and proper.

(13) That wherever the Lehigh Coal Company bought stocks of other coal companies from Lehigh Railroad Company it paid at least the cost of those stocks to Railroad Company at the time of purchase.

(14) That rentals paid by Lehigh Coal Company to Lehigh Railroad Company were fair, honest rentals.

(15) That rentals charged to Lehigh Coal Sales Company after March 1, 1912, were fair, honest rentals.

(16) That in the few instances in which leases by Lehigh Coal Company to others contained shipping covenants, the covenant was always treated as a dead letter, and the matter was one of inadvertence, and not of specific intent.

(17) That the sales contract of March 1, 1912, was a bona fide legitimate contract.

(18) That the trestle and yard leases of which the Petition complains have not existed since March 1, 1912.

ARGUMENT.

It comes to this, therefore, that the case of the Government against the Lehigh Coal Company stands

(1) Upon the admitted fact of stock ownership by Lehigh Railroad Company;

(2) Upon the admitted fact of coal acquisition by Lehigh Coal Company, (a) generally and (b) along the lines of Lehigh Railroad;

(3) Upon financial transactions between Lehigh Coal Company and Lehigh Railroad Company prior to 1903;

(4) Upon an admitted sales agency contract with G. B. Markle Company with which Lehigh Coal Company has had nothing to do since March 1, 1912, before the institution of this suit;

(5) Upon admitted purchase contracts of coal prior to May 26, 1913, which were all terminated by decree of the United States Court May 26, 1913, before the institution of this suit;

(6) Upon the admitted execution of the sales contract of March 1, 1912.

(7) Upon a number of admitted facts to which Counsel for the Government seem to attach great importance, which, it is respectfully submitted, are too trifling to merit either extended statement or serious consideration, as that—

(a) The offices of the General Auditor, and the Secretary and Treasurer (one man), of the Lehigh Coal Company, were for a short time in the same office building in which the Lehigh Sales Company had offices. (Record, Vol. 1, page 172).

(b) The same officers of the Lehigh Coal Company now have offices upon the third floor of an eleven storied office building in New York City, in which on the tenth and eleventh floors, the Lehigh Railroad Company has offices. (Record, Vol. 1, page 172).

(c) The annual reports of the Lehigh Coal Company and the Lehigh Railroad Company are printed by the same printer, and gotten up in the same form as to quality of paper and binding, and are printed about the same time, which, in view of the fact that the two reports are properly sent together to the stockholders of the Lehigh Valley Railroad Company for their information, would seem to be a matter of convenience and not a crime.

(Record, Vol. 1, page 167.)
(Record, Vol. 1, pages 24-25.)

Taking these things up in the order stated:

(1) *Stock Ownership by Lehigh R. R. Co.*

April 15, 1869, the Governor of Pennsylvania approved an Act of the General Assembly of Pennsylvania which was in line with the policy of the Commonwealth as evidenced by repeated legislation beginning in 1818 and extending continuously and almost yearly down to and past the year 1869, and until that policy had become fixed and established.

This Act is entitled

"An Act

To authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this Commonwealth."

It reads as follows:—

Section 1. Be it enacted, &c.

"That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this Commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of an agreement to purchase the principal and interest of either of such bonds: Provided, That this Act shall not apply to the stock and bonds of any corporation possessing

mining or manufacturing privileges in the County of Schuylkill."

(*Pamphlet Laws of Pennsylvania*, 1849, page 31.)
(1 Rec., 2171.)

The Petition lays stress upon Art. XVII, Sec. 5, of the Constitution of Pennsylvania of 1874, as if its prohibition, preventing an incorporated company doing business as a common carrier from directly or indirectly prosecuting or engaging in mining or manufacturing articles for transportation over its works, made it unlawful thereafter for a railroad company to exercise the rights conferred upon it by the Act of 1849 (supra), and other similar Acts.

But the Lehigh Railroad Company never prosecuted or engaged in mining coal.

Its acquisition by purchase or merger, of the stocks of coal mining companies was not forbidden by the Constitution of 1874.

This is the adjudged and well settled law of Pennsylvania.

Comm. vs. N. Y. L. E. & W. R. R., 132 Pa., 392.

Opinion of Secretary of Internal Affairs of Pennsylvania in

Hartwell vs. B. R. & P. Ry. Co., 19 Pa. C. C. Reps., p. 231.

So far, therefore, as the acquisition of the capital stock of the Lehigh Coal Company by the Lehigh Railroad Company is concerned, it was a perfectly lawful transaction, expressly sanctioned and authorized by statute.

(Statute of 1869, P. L., p. 31.)
(4 Rec., 2171.)

This case is utterly free from any evidence that the ownership of this stock has enabled or can enable a violation of the Sherman Act.

No specific allegation of domination of the Lehigh Coal Company by Lehigh Railroad Company has been proved by the Government, and to the contrary every such allegation has been denied and disproved.

The matter stands, therefore, solely upon the admitted relations as to stock ownership of Lehigh Railroad Co. and those things which have been done in view of that relationship.

What has been done during the existence of that relationship will be treated at length in the next succeeding portion of this brief.

The acquisition of the capital stock of Coxe Brothers and Company, Incorporated, by Lehigh Railroad, stands equally upon a perfectly lawful basis.

(Statute of 1869, P. L., p. 31, supra.)

What has been done during the existence of that admitted relationship as to the production, transportation and disposition of the coal of Coxe Brothers and Company, Incorporated, and the proportionate amount of it, and the impossibility that it can have any such effect as to sustain the charges of the Petition, will be treated at length in the next succeeding portion of this brief.

Before leaving this question of stock acquisition by the Lehigh Railroad Company, and as showing a judicial interpretation in Pennsylvania, of the purpose of the Act of April 15, 1869 (supra), the language of Paxson, C. J., in Comm. vs. N. Y. & L. E. R. R. Co., 132 Pa., 606, is quoted, as follows:

"The object of this legislation is obvious. It was to authorize railroad and canal companies to employ their capital and credit to aid in the development of the mineral resources of the Commonwealth. Such development, as every one knows, is, in many instances, beyond the reach of individual enterprise. It was easy enough to form corporations with all the requisite powers for this purpose. It was a very different thing to fin. capitalists to take their stocks or bonds. Hence it was that the legislature gave to railroad and canal companies the power to purchase both stocks and bonds of such companies. Nor was any limitation placed upon this power. They might buy a portion or all of the stock."

The Government brief argues that the policy of Pennsylvania is evidenced solely by the provision of the Constitution of 1874; and that position might fairly be argued to be the beginning of a new policy from the date of the adoption of the Constitution, were it not for the fact that it has been adjudicated in Pennsylvania that the provision of the Constitution relied upon has no applicability whatever to the long line of statutes, including the Act of 1869 (supra), by which the policy of the Commonwealth to encourage railroad companies to employ their "capital and credit" to aid coal companies "in the development of the mineral resources of the Commonwealth," has been established.

How can there be any doubt as to what has been the policy of Pennsylvania in view of the language of Judge Gray in *U. S. vs. Delaware & H. Co., et al.* at page *224* of *164 Fed.*, afterwards quoted by the Supreme Court in the *Delaware* and *Hudson Case*, at page *402* of *213, U. S.*?

That language is as follows: "The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative Acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be

conveniently and profitably conveyed to market in Pennsylvania and other States."

* * * * * * * * *

"It is not questioned that pursuant to this general policy investments were made by all the defendant companies (of which Lehigh Railroad was one) in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economics promoted by the facilities of transportation thus brought about."

* * * * * * * * *

It is not denied that the situation thus generally described is not a new one, created since the passage of the Act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both."

See also (L. V. R. R. Ex. 87, Record, Vol. 4, 2382-2396.)

(2) *Lehigh Coal Company's Acquisition of Coal Lands.*

Under all the evidence in this case, the Lehigh Coal Company has acquired in fee and by lease less than one-tenth of the anthracite acreage in Pennsylvania.

It is able to produce less than one-tenth of the total anthracite tonnage, which is annually produced in Pennsylvania.

Apart from the fact that for more than two and one-half years it has not been engaged in interstate and foreign trade and commerce, how can it "in and of itself" constitute a combination in restraint of interstate and foreign trade and commerce?

How could so small a control, in part under term leases which may not be renewed, in part of lands which are nearing exhaustion, amount to a monopoly within the prohibition of the Sherman Act?

All through this case the learned Counsel for the Government have ignored the nature and character of the anthracite coal mining business.

Particularly, they have closed their eyes to the fact, that the termination of time leases, and the exhaustion both of fee and leased coal will rapidly reduce the acreage and tonnage output of the Lehigh Coal Company.

They seem to think that anthracite coal is a perpetually renewing thing, like grass or fruit, or can be made to grow again like grain, forgetting that in the progress of the mining the substance of the land itself is taken away and forever destroyed, and that when an operation is ended by exhaustion of the coal the immense expenditure of money in gangways, airways, slopes, tunnels, shafts, breakers, boilers and boiler houses, fan houses and machinery of every kind and description is absolutely lost. It has not even a junk value, since the cost of getting the outside improvements off the land is generally in excess of its junk value.

How could the control of so small a fraction of acquisition and production of anthracite coal amount to a restraint of interstate and foreign trade, and a monopolization of a part of the same, in violation of the Sherman Act?

Let us examine now the extent of acquisition and production as affected by the alleged combination of the Lehigh Coal Company with other defendants, to wit: Coxe Brothers and Company, Incorporated, New York and Middle Coal Field Railroad and Coal Company, G. B. Markle Company, and the Lehigh Railroad Company.

All of the Lehigh Coal Company's acquisitions from the Lehigh Railroad Company, and all of the Lehigh Coal Company's production of anthracite coal from such acquisitions has been included in

arriving at the proportions of coal acreage held by it, and coal produced by it, as above.

For more than three years and one-half it has taken no coal under the G. B. Markle Company agency contract.

As to Coxe Brothers and Company, Incorporated, the claim of the Government is that because the Lehigh Railroad owns the capital stock of that company as well as the capital stock of the Lehigh Coal Company, the latter company is involved in a combination, &c., with Coxe Brothers and Company, Incorporated, because it takes the coal of Coxe Brothers and Company and ships it to market over the Lehigh Railroad.

Bearing in mind that there is no dispute of the fact that since May 26, 1913, before this suit was brought, the Lehigh Coal Company has not taken any of the coal of Coxe Brothers and Company, Incorporated, let us see what the result would have been if that practice had continued.

The total anthracite acreage of Coxe Brothers and Company, Incorporated, is less than two (1.84 per cent.) per centum of the total anthracite acreage in the districts in which the Lehigh Coal Company operates.

The total tonnage of Coxe Brothers and Company, Incorporated, is less than two per centum of

the total anthracite tonnage produced in the districts in which the Lehigh Coal Company operates.

The total acreage and tonnage of Coxe Brothers and Company, Incorporated, is about four and one-half (4.50 per cent.) per centum of the total acreage and tonnage of and from lands, located along the lines of the Lehigh Railroad.

As to the New York and Middle Company, from which the Lehigh Coal Company leases a small portion of its lands, the total acreage so acquired is three-tenths (3-10ths) of one (1) per centum of the total acreage of anthracite coal lands in the districts in which the Lehigh Coal Company has lands, and the tonnage production upon the same basis is a like proportion, to wit: three-tenths (3-10) of one (1) per centum.

Comparative acreage and tonnage of these New York and Middle lands with acreage and tonnage along the lines of the Lehigh Railroad and naturally and conveniently accessible thereto for transportation shows them to be one (1) per centum of such acreage and tonnage.

Now bearing in mind that three of the eight anthracite producing counties of Pennsylvania are not included in arriving at the fraction of anthracite coal lands which have been acquired, and the tonnage of coal produced by the Lehigh Coal Company—because it has no lands or operation in said counties—it is apparent that the fraction repre-

senting the Lehigh Coal Company's acquisitions and production, as compared with the total acquisition and production of anthracite in Pennsylvania, including Coxe Brothers and Company, Incorporated, and the New York and Middle Company, is still less than ten (10 per cent.) per centum; and that the Lehigh Coal Company, even with such additions, holds not more than one-fourth (¼) of the coal lands, and produces not more than one-fourth (¼) of the coal therefrom located along the lines of Lehigh Railroad and naturally and conveniently tributary thereto.

All of the rest of said coal—three-fourths of the entire output—is in keen competition with the coal produced and thus acquired by the Lehigh Coal Company,—and all the rest of the anthracite coal produced in Pennsylvania is in competition with the Lehigh Coal Company's coal and beside that, all of the smaller or steam sizes of Lehigh Coal Company's coal is in further competition with bituminous coal.

Ninety (90) per centum of the entire output of anthracite coal in Pennsylvania is in competition with the coal produced by the Lehigh Coal Company, in addition to the bituminous competition.

This is evidently the reason why the learned Counsel for the Government who drafted the Petition in this case did not allege a combination and conspiracy to monopolize interstate trade, &c., in anthracite coal, but only alleged that the combina-

tion, &c., was attempting to monopolize and was monopolizing *a part of* such trade.

The language of the Sherman Act (Sec. 2) is, "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, &c."

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance, that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

White, C. J., in Standard Oil Co. vs. U. S., 221 U. S., p. 61.

May there be a violation of the statute where the allegation of monopoly goes only to a part of a part—that is, to a part of a "class"?

Only where the control of the part is of so nearly all of the article of trade or commerce as to enable the person or persons controlling it to bring about the same mischiefs which they might bring about if they controlled the whole.

Harriman vs. Menzies, 46 Pac., 730.
S. C. 56 Am. State Reps., 81.

Bouvier's definition of the word monopoly is, "The abuse of free commerce, by which one or

more individuals have procured the advantage of selling all of a particular kind of merchandise."

It is hardly necessary, however, to go outside the Standard Oil case (supra) to ascertain that the monopoly aimed at by the Sherman Act is such control of a commodity in interstate and foreign commerce as produces the same evils which were produced by a monopoly at Common Law of England, whether the monopoly were conferred by Patent or produced by private contrivance, called "engrossing."

"As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc."

Standard Oil Co. vs. U. S., 221 U. S., p. 53.

That difference is clearly indicated by the prohibition of the statute 5 and 6 Edw. VI, ch. 14, which makes it unlawful for any person or persons to "get into his or their hands by buying, contracting or promise-taking * * * any corn growing in the fields, or any other corn or grain, butter, cheese, fish or other dead victual whatsoever, within the realm of England, to the intent to sell the same again," &c.

Standard Oil case (supra), p. 53.

But when the *sole* trade of anything is "engrossed," then *"ex rei natura"* that is a kind of engrossing quite different from the getting of a part of the article into one's hands to sell again, for the reasons stated in the citation from *Moore 673; 11 Rep., 84.* (Standard Oil case, p. 53-54)—because that is getting the whole trade in that article, "the *sole* trade of laying and selling," into the hands of the engrosser, and although both kinds are forbidden by the statute, only the latter kind is defined as the same thing as a monopoly, for only the getting of the whole of the commodity, or so large a part as enables the control of the whole, can produce the evils which are created by a monopoly, and which are the things which the law seeks to prevent.

This accords with Bouvier's definition of an engrosser who is said to be "one who purchases large quantities of any commodity *in order to have the command of the market* and to sell them again at high prices."

Bouvier's Law Dictionary, Vol. 1, p. 536.

What are Those Evils?

(1) The power to fix the price, and thereby injure the public;

(2) The power to limit the production and

(3) The power to deteriorate the quality of the product.

To which may be added, as covered by the Sherman Act, (Sec. 1.):

(4) Restraint of interstate trade or commerce, &c.,—that is, suppression of competition.

Standard Oil Co. vs. U. S., 221 U. S., p. 48.

Not a single one of these "baneful effects" ever has resulted, or ever can result, from Lehigh Coal Company's control of its fractional part of anthracite coal.

Neither by itself nor in conjunction with the other defendants is it possible for it, controlling less than a tenth of the product, to fix the price of anthracite generally, or to increase the price of its part of the product beyond that which is fixed by the competition with the owners of the nine-tenths.

From 1902 to 1912 when it ceased interstate trade in anthracite, it never increased the price of the product to the consumer.

During periods of strikes and suspensions, and following those times, although many of its competitors raised the price of anthracite to abnormally high figures, it never took advantage of those abnormal conditions to raise the price to its customers.

The control of Lehigh Coal Company is so small that it is not possible for it to restrict or

limit the production of anthracite coal. As lessee, under a large number of leases requiring it to pay for the coal demised whether it is mined or not, many of said leases allowing no recoupment from future mining, it is impossible for it, without financial ruin, to limit the amount of its own production. Under the undisputed evidence, it has never attempted to limit its production, but has increased the same continuously and substantially.

There is no claim on the part of the Government that by the control of the Lehigh Coal Company there has been or could be any deterioration of the product, either as to anthracite coal generally, or as to the output of the Lehigh Coal Company specifically.

To deteriorate its own product would mean that it could not be sold either at all, or profitably, and would result in financial disaster to the Lehigh Coal Company.

As to restriction of competition, the Government offered two witnesses, who utterly failed them.

On the other hand, ninety-five per centum of all the competitors with the Lehigh Coal Company when it was shipping coal (prior to March 1, 1912), who have been competitors with the Lehigh Sales Company since that date, testify that the conditions,

both of production and transportation, have always been and now are such as to enable them to compete fully and successfully with both of said companies.

Both from the very nature of things, that is, the comparatively small control proportionately, and from the actual facts, that is, the proof of what has occurred and is occurring, none of the evils of monopoly or restraint of trade in interstate commerce exist in this case, nor can exist.

Lehigh Coal Company Not Engaged in Interstate Commerce.

"Interstate commerce is not determined by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but rather by its actual delivery to a common carrier for transportation, in the actual commencement of its transfer to another State."

U. S. vs. Boyer, 85 Fed. Rep., p. 425.

"Neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured prior to the commencement of the actual transfer or transmission thereof to another State, constitutes that interstate com-

merce which comes within the regulating power of Congress."

In re Greene, 52 Fed. Rep., 113, citing inter alia,

Pensacola Telephone Co. vs. Western Union Tel. Co., 96 U. S., p. 1.

Brown vs. Houston, 114 U. S., p. 622.

Coe vs. Errol, 116 U. S., p. 517-520.

Robbins vs. Taxing District, 120 U. S., p. 497.

Kidd vs. Pearson, 128 U. S., p. 1.

Coal mining is not interstate commerce.

U. S. vs. Boyer, (supra).

State of Arkansas vs. Kansas, &c. Coal Co., 96 Fed. Rep., p. 359.

If, therefore, interstate commerce is not determined by the character of the commodity, nor by its preparation for market, which involves all of those processes of production and manufacture which are required to make it a marketable commodity, and up to the point of actual delivery to a common carrier for transportation, it does not come within the regulating power of Congress, how, under the undisputed proofs in this case, can the Lehigh Coal Company of and by itself constitute a monopoly or an attempted monopoly, in violation of the Sherman Act?

Its comparatively small ownership and control of anthracite coal would not, in itself, amount to engrossing at Common Law of England, which,

according to Bouvier, is "to buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price."

Its mere control as owner and lessee of less than one-tenth of the anthracite coal in Pennsylvania, cannot therefore be a monopoly at common law, even though the term be stretched to cover engrossing upon a scale which results in evils similar to those which exist under a common law monopoly created by patent. (See U. S. vs. Standard Oil Co., supra.)

It cannot, therefore, by the same token, be a monopoly of and by itself within the contemplation of the Sherman Act, regarded as a producer and manufacturer.

The only possibility of making out a case against the Lehigh Coal Company is to prove:—

(1) That it is engaged in interstate commerce, and

(2) That being so engaged, it is in combination with other defendants named to restrain trade in and monopolize, &c., that commerce.

Under the undisputed evidence in this case, the Lehigh Coal Company, since March 1, 1912, has mined and prepared anthracite coal and has sold and delivered all of it at its mines and breakers

entirely within the State of Pennsylvania, and has neither sold nor delivered nor shipped for delivery any anthracite coal to any person or place outside the State of Pennsylvania.

(Record, Vol. 3, pages 1611-1612.)
(Record, Vol. 3, pages 1691-1692.)

Not being engaged in interstate commerce, and neither selling, shipping nor controlling the sale or shipment of anthracite coal or shipment of anthracite coal outside the State of Pennsylvania, having no control of any kind over the conduct of its vendees, and no relations with them, except as vendor, how can it be assumed that the Lehigh Coal Company is in an unlawful combination and conspiracy with one of the said vendees, to violate the Sherman Act?

It cannot be held to have been engaged in interstate commerce, since March 1, 1912,—which was prior to the bringing of this suit,—upon the theory that the price of its coal is based upon sales of that coal at tidewater, without the State of Pennsylvania, because that is not a proper or correct construction of its contract of sale.

The price of its coal is fixed without regard to where its coal is sold, and without regard to whether it is sold or not by its vendee.

Reference to the average price of coal at tide is merely a method of calculating the price of the Lehigh Coal Company's coal at its breakers, where it is delivered to its vendee, and it is the average

price of all anthracite coal sold at tide which determines that price, and the Lehigh Coal Company is to get that price at its mines, whether any of its coal is sold at tide or not, and, indeed, whether its vendee sells any of the coal, or not.

For precisely the same reasons, Coxe Brothers and Company, Incorporated, are not engaged in interstate commerce, and have not been so engaged since a time prior to the beginning of this suit.

The reasons which actuated the Lehigh Coal Company in withdrawing from interstate commerce, are entirely corroborative of its good faith in so doing.

The Government has made no assault upon its expressed reasons, but has contented itself with reflections upon certain things connected with its method of withdrawal.

These reflections amount to no more than a suspicion of bad faith, from what is claimed to be undue concessions in the sales contract of March 1, 1912.

The overwhelming evidence is, that the contract of March 1, 1912, was a contract, not only in good faith between the parties thereto, but that it was a fair contract from a business standpoint, without any undue concession on the part of either of the contracting parties, which is warrant for any suspicion concerning it

Its general method, and much of its detail was submitted to the Department of Justice, and was known to the then Attorney General of the United States, who referred to it, after its consummation, in his annual report without a word of disapproval, as apparently satisfactory to the Government.

(3 Rec., pp. 1267-1269.)

It was a bona fide attempt by the Lehigh Coal Company to do away with that criticism of the Government which was founded upon the transportation of coal sold by the Lehigh Coal Company in interstate trade, and shipped for that trade over the Lehigh Railroad, because of the stock ownership of the Lehigh Coal Company by the Lehigh Railroad Company.

It put an end to that situation.

There was no practical way for the Lehigh Coal Company to sell its output at the mines, except to some association of individuals, or to a corporation, with large financial means, and adequate facilities for handling and re-selling the coal.

(3 Rec., page 1245.)

Outside the relationship of vendor and vendee, created by the contract of March 1, 1912, there is no pretence of any connection between the Lehigh Coal Company and the Lehigh Sales Company except,

(1) The word "Lehigh" is common to the title of both companies.

Quite natural, for trade reasons, that a company selling largely "Lehigh" coal should use that word as a part of its title.

Many other corporations, with whom there is not the slightest pretence that the Lehigh Coal Company is connected, do the same thing, as

Lehigh Coal & Navigation Company,
Lehigh Luzerne Coal Company,
Lehigh & Susquehanna Coal Company,
Lehigh & Wilkes-Barre Coal Company.

(2) Two employees of the Lehigh Coal Company once had offices in the same building—90 West Street, New York City,—where the Lehigh Sales Company had its offices.

Not that they were connected in any way, beyond using the same set of elevators, but just that they were for awhile, and before they could get offices elsewhere, in the same office building.

(3) By a circuitous route the Lehigh Railroad owning the capital stock of the Lehigh Coal Company and some of the individual stockholders of the Lehigh Railroad being the owners of some of the capital stock of the Lehigh Sales Company, therefore, the Lehigh Coal Company and the Lehigh Sales Company are in an unlawful combination and conspiracy, etc.

To state the proposition, clearly answers it.

(4) One of the directors of the Lehigh Coal Company is also one of the directors of the Lehigh Sales Company.

(5) Paul Moore, one of the directors of the Lehigh Sales Company, is a son of Hon. W. H. Moore, who is one of the directors of the Lehigh Railroad Company; therefore, because Lehigh Railroad Company owns the capital stock of the Lehigh Coal Company and some of the individual owners of some of the capital stock of the Lehigh Railroad own some of the stock of the Lehigh Sales Company, and a son of a director of the Lehigh Railroad is a director of Lehigh Sales Company, it must be that the Lehigh Railroad Company and the Lehigh Sales Company, and G. B. Markle Company, and Coxe Brothers and Company, Incorporated, and the New York and Middle Company and some fourteen individuals named are all in a combination and conspiracy to violate the Sherman Act.

This, again, is an illustration of the multifariousness and unfairness of the Petition in this case.

To state the proposition is to answer it.

There is nothing, therefore, in the case to show that the Lehigh Coal Company is engaged in interstate trade, &c., or was so engaged when this suit was brought.

To the contrary, it is clearly and without contradiction proved that it is not so engaged and was

not so engaged for a long time prior to the commencement of this proceeding.

It would seem, however, that Counsel for the Government, abandoning the plain meaning of the language of the Petition, now rest their claim that the Lehigh Coal Company is engaged in interstate trade and commerce upon the theory of a legal identity between the Lehigh Railroad Company and the Lehigh Coal Company and a failure of dissociation from the coal prior to transportation.

Alleged Identity of Corporators.

The Petition in this case asserts "that defendant Lehigh Coal Company in and of itself constitutes a combination in restraint of interstate and foreign trade and commerce and a monopolization of a part of the same, in violation of the aforesaid Act of July 2, 1890," and prays its dissolution, &c.

(Petition, pages 76-77.)
(Record, Vol. V, p. 46-47.)

This is quite inconsistent with the allegation of the Petition that "Lehigh Coal Co. is and always has been a mere adjunct, department or instrumentality of Lehigh Railroad, and is not and never has been a *bona fide* separate corporation."

(Petition, page 64.)
(Record, Vol. V p. 40.)

Recognizing this inconsistency, the Petitioner apparently abandons the claim that the Lehigh Coal

Company is a monopoly "in and by itself," and puts the case squarely upon the following:

(1) The Lehigh Coal Co. is not a separate, independent, *bona fide* corporation, but is a mere tool or instrumentality of Lehigh Railroad Co., and a "parasite" on said Railroad Co.

Lehigh Coal Co. and Lehigh Railroad Co. are therefore one and the same thing, and this is so because,

(a) Lehigh Railroad Co. owns all the stock of Lehigh Coal Co.

(b) Lehigh Railroad Co. has so intermingled its affairs with the affairs of Lehigh Coal Co. that the latter is "a mere department of the railroad."

(2) All the coal mined, as well as that formerly purchased by Lehigh Coal Company, is really mined and formerly was purchased by Lehigh Railroad Company, so that all the coal which the Railroad Co. prior to March 1, 1912, mined, produced, bought, owned, sold and shipped over its own lines of railroad in the name of the Lehigh Coal Co. was really mined, produced, &c., by Lehigh Railroad.

(3) The ceasing to purchase outside coal, and the ceasing to act as sales agent for the Markle coal, and the sale and delivery of all the coal mined by the Lehigh Coal Co. at the mines in Pennsylvania, to the Lehigh Sales Co. does not therefore

create a *bona fide* dissociation of the title of Railroad Co. to the coal prior to the beginning of transportation in interstate commerce, because,—

(a) Some of the stockholders of Lehigh Railroad are also stockholders of Lehigh Sales Company, and

(b) By reason of the identity of Lehigh Railroad Co. and Lehigh Coal Co. the contract of March 1, 1912, was really a contract between the Railroad Co. and Sales Co., and

(c) The contract of March 1, 1912, was not a *bona fide* contract dissociating the Railroad Co. from the Coal prior to the beginning of transportation.

Taking up now the argument as to identity of the Lehigh Coal Co. and the Lehigh Railroad Co., it is clear that no such relationship is established by the fact of Lehigh Railroad's stock ownership of Lehigh Coal Co.

Exchange Bank vs. Construction Co., 25 S. E., 328.
U. S. vs. D. & H. Co., 213 U. S., p. 415.
U. S. vs. L. V. R. R. Co., 220 U. S., p. 266.
U. S. vs. D., L. & W. R. R. Co., 213 Fed. Rep., p. 253.

Legal identity can only be established by showing "a course of conduct or a series of acts," in conjunction with stock control, which has "oblit-

erated all distinction between the two corporations," and has so commingled their affairs "as by necessary effect to make those affairs practically indistinguishable, and thus to cause both corporations to be one for all purposes."

"The owner of shares in a corporation does not own the corporate property. The holders of controlling stock interests control the corporation,—the corporation controls its property."

Noyes on Intercorporate Relations, 2d Edition, p. 295, citing,

Pullman Co. vs. Missouri Pac. R. R. Co., 115 U. S., page 587.

Shepp et al. vs. Traction Co., 17 Mont. Co. (Pa.), page 52.

The rights and powers of a corporation holding a control of the stock of another corporation are those of a stockholder only. "It"—the controlling company—"is not the corporation"—(whose stock is held), "in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

Mr. Chief Justice Waite, in

Pullman Car Co. vs. Missouri Pac. Co., (supra) page 595.

Between mere control by stock ownership, and an actual control of property and business so as to render the two corporations indistinguishable, there is a wide difference, and the nature and extent of the acts relied upon to prove such actual control, as

distinguished from stock control, being nowhere specifically defined, there is a broad field of argument as to whether certain acts, admitted or proved, are acts which properly accompany the relationship arising from stock control, or go beyond that, and amount to such an abuse of that relationship as to destroy separate corporate existence, and make the two corporations one in the eyes of the law.

Separate identity established by separate charters, separate organization, separate officers, separate management of business affairs, accounts, funds, &c., can only be swept away by such clear and overwhelming proof of the intermingling of the affairs of two corporations, as is tantamount to a legal consolidation of the two companies.

It must be such proof as will convince a Court that the relations of the two corporations are the same as if a consolidation had been had, under the forms of law.

In other words, it must be sufficient to clearly show that a consolidation in fact exists.

The only guide in the books as to what would amount to sufficient proof, if adduced, to destroy separate corporate existence, and produce identity, by "conduct" as distinguished from actual consolidation, are the allegations, never proved in the proposed amendment to the Petition in the case of *U. S. vs. D. & H. Co. et al., reported in 213 U. S., page 366.*

No attempt was ever made to prove these allegations, although the amendment was allowed April 3, 1911. Nearly two years afterward (January, 1913) the amended bill of complaint was dismissed without prejudice, upon the application of the United States with consent of Lehigh Railroad Co., defendant.

(Record, Vol. II, page 700.)

This was nearly a year after the formation of the Lehigh Sales Company, and ten months after the contract of March 1, 1912, between the Lehigh Coal Co. and the Lehigh Sales Co.

Without commenting upon this lapse of time, in which the petitioner made no effort to prove the allegations upon which the amendment was secured, the brief of Petitioner says that "the formation of the Lehigh Valley Coal Sales Company introduced so many new factors into the situation that it seemed best to obtain a decree dismissing the amended Petition without prejudice and to incorporate *its substance* in a new Petition,—the one on which the present suit is based." (Italics ours.)

(Brief for U. S., page 238.)

Although it is difficult, both in the petition for the proposed amendment and in the present petition, to separate allegations of facts from allegations of conclusions arising upon mixed questions of fact and law, a comparison of the allegations of the petition asking for an amendment, with the allegations of the petition in the present case, will show

the omission from the latter of vital matters of substance contained in the former.

(1) For example, the petition to amend says, that "for a long time past the officers of the defendant (R. R. Co.) have been and are now the principal officers of the Coal Company. They are appointed officers of the Coal Company through the influence of the defendant (R. R. Co.) and for the reason that they are, respectively, officers of the defendant (R. R. Co.); as officers of the Coal Company they are acting merely on behalf of and for the defendant (R. R. Co.) and under the direction and instructions of the latter."

See U. S. vs. D., L. & W., R. R. Co., 213 Fed., 246.

In the present petition this allegation is supplied with the following:—

"Lehigh Coal Co. has six directors. Two of these, namely, D. G. Reid and Edward T. Stotesbury, are directors of Lehigh Railroad. A third, L. D. Smith, is vice-president of Lehigh Railroad. A fourth, I. A. Stearns, was from 1897 to 1910 a director of Lehigh Railroad. These and also the other officers and directors of Lehigh Coal Co. were chosen by or at the instance of Lehigh Railroad, its sole stockholder, to direct and manage it in all respects in the interest of the Railroad."

More important still, there is not a scintilla of evidence to show that any of the "other officers" of

Lehigh Coal Co., as distinguished from its directors, were "chosen by or at the instance of Lehigh Railroad," or that any of the "officers and directors" were chosen "by or at the instance of Lehigh Railroad," or by or at the instance of anybody else "to manage it" (L. Coal Co.) "in the interest of the railroad" (L. V. R. R.).

That as a controlling stockholder of Lehigh Coal Co., the Lehigh R. R. Co., by its stock vote does elect the board of directors, is conceded.

The law does not seem to provide any other method, and under such circumstances the legal rights of the Lehigh Railroad in this matter are the same as those of any natural person, holding a like control.

(2) The petition to amend says that "the defendant (R. R. Co.) by reason of the fact that it owns the entire capital stock of the Coal Co. is enabled to and does dictate who shall be elected directors of the Coal Co., who shall be its officers and employes, and who shall be on the various committees.

U. S. vs. D., L. & W. R. R., 213 Fed., 246.

The present petition makes no such allegation as to dictating who shall be the "employes" of Lehigh Coal Co.—or even who shall constitute its committees, nor has any proof been offered by the Government to support any such allegation.

Now, taking into account the enormous number of employes necessarily employed by Lehigh Coal Co., it is certain that an allegation, if sustained by proof, that it did not choose its own employes, but that they were selected by Lehigh R. R. Co., would be something which would go a long way toward proving that it was not an independent and separate company. It might indeed of itself establish the averment of identity.

That a corporation employing thousands of men did not do its own hiring, but permitted another corporation, the owner of its capital stock, either to do or dictate that hiring, was a vital allegation upon the question of the independence of the former.

It was upon the promise to prove this, that the amendment was allowed.

Why is it omitted from the present petition, and why is no attempt made to prove it in this case?

Because, although it was asserted as a fact, it was not true, and could not be proved.

The vice of it is, that the pleader, having in mind the conceded stock ownership of Lehigh Railroad Co., assumed that by virtue of that relationship, everything which Lehigh Coal Co. ever did was done at the dictation of Lehigh Railroad, its sole stockholder, therefore, Lehigh Railroad dictated the hiring of the employes of Lehigh Coal Co.

It was not put to the Supreme Court in that way.

It was submitted to the Court as a fact which the Petitioner would prove if the amendment were allowed, and reference was made to the stock ownership only as something enabling Lehigh Railroad to do that which the Petitioner alleged to be a fact.

It was one of the many alleged facts in the petition to amend which subsequent investigation by the Government showed to be mistakenly averred, and which, therefore, were omitted from the petition in this case, and abandoned.

(3) The petition to amend alleges that "the Coal Company uses the offices of the defendant (R. R. Co.), and the work is carried on over the desks belonging to the defendant (R. R. Co.).

(Fed. Rep., 213, p. 246.)

Nothing of this sort is even pretended in the present case.

(4) The petition to amend alleges that "the defendant (R. R. Co.) through its officers and directors, exercises a supervision over the coal mined by the Coal Company from the time of the mining of said coal to the sale of the same at New York and other markets. The defendant (R. R. Co.), through its officers and directors" (officers and directors of R. R. Co.) "determines how much coal the Coal Company shall mine, it dictates the ship-

ment and transportation of said coal over its own lines, and it fixes, regulates, and determines the price at which the Coal Company shall sell the coal at the Atlantic seaboard and other places to which it has been transported over the lines of defendant (R. R. Co.) or at the dictation of defendant" (R. R. Co.).

(Fed. Rep., 213, p. 246.)

No such allegations are set forth in the present petition, and if any of them is covered up in some of the "conclusion allegations," there is no proof in the case to sustain a single one of them.

(5) The allegations of the petition to amend as to the so-called sixty-five per cent. contracts, although repeated in the present petition, are matters of history, and were such when the present petition was filed.

There is no proof of compulsion or domination of Lehigh Coal Company in the making of these contracts, and it is now settled by the opinion in U. S. vs. Reading Co., 226 U. S., 324, that these contracts in and of themselves were perfectly lawful, and they were cancelled by the Court solely by reason of the concerted action by which they were brought into existence.

The other allegations of the petition to amend are of conclusions, which in one form or another are likewise pleaded as if they were allegations of fact, in the present petition.

The Petitioner in the present case has failed, therefore, both by way of allegations and by way of proof, to establish any such state of facts, as it promised the Supreme Court it would establish if the amendment of 1911 were allowed.

The conduct of Government counsel in failing to proceed for nearly two years after the allegations were made, and the amendment allowed, and their procuring the dismissal of the amended bill of complaint, is not accounted for by any change of the situation caused by the formation of the Lehigh Sales Company, but rather, in view of the allegations of the new petition, seems clearly to indicate that it was ascertained by subsequent investigation, that many of the charges upon which the amendment was allowed could not be proved.

Upon this phase of the case, therefore, the question is, has the Petitioner proved enough to meet the definition of the Supreme Court as to what will obliterate, apparently separate corporate existence, and "of necessity" produce corporate identity between the Lehigh R. R. Co. and the Lehigh Coal Co.?

The test is not what the Petitioner seeking the amendment of 1911 promised to prove, nor is the defendant affected by what was said upon the assumption that the promise would be fulfilled. It is not to be tested by vehement allegations and accusations in the former petition, nor in the present petition, but by the proof in this case and solely

upon the determination of whether the facts in this case are sufficient to warrant a finding that "by necessary effect" the affairs of Lehigh R. R. Co. and Lehigh Coal Co. are "practically indistinguishable," and that both corporations are, to all intents and purposes, one.

The burden of proof is on the Petitioner.
U. S. vs. Stinson, 197 U. S., page 200.

The kind and quantity of proof required is such as clearly would establish consolidation in fact.

(3) *Financial Transactions.*

(1) Stocks.

In all the financial transactions between Lehigh Railroad Co. and Lehigh Coal Co. the relation has been that of creditor and debtor.

The accounts of all such transactions are kept as accounts between creditor and debtor.

Since 1902, there has been practically no loaning of money by Lehigh Railroad Co. to Lehigh Coal Co.

(Record, Vol. 3, page 1680.)

To sustain the charge that Lehigh Railroad "has virtually given money to the Coal Co." (Petition, page 49) it is claimed that this is evidenced by the sales in 1905 by Lehigh Railroad Co. to the Coal Co. of the stocks of the Connell Coal Co. and

the Seneca Coal Co., at prices very much less than the Railroad Company paid for those stocks in 1901.

Lehigh Coal Co. paid for those stocks their full book value at the time of purchase.

(Record, Vol. 3, pages 1681-1682.)
(Record, Vol. 3, pages 1351-1353.)

The book value of these stocks was written down by the Railroad Company as follows:—

Seneca stock in 1901 and 1904.
Connell stock in 1902 and 1904.

Lehigh Coal Company paid the full book values of these stocks as they then stood, when it bought them in 1905.

(Record, Vol. 3, 1681-1682.)
(Record, Vol. 3, 1352.)

How can it be reasonably asserted that the action of the Railroad Company so long before there was any contemplated sale of these stocks to Lehigh Coal Co. is evidence of an intent to sell them for less than they were actually worth?

All of the financial transactions between Lehigh Railroad Company and Lehigh Coal Company are set forth in detail in Railroad Company's exhibit 69.

(Record, 2334.)

A full explanation of this exhibit is contained in the testimony of Mr. Morrison.

(Record, 1332-1353.)

Without introducing into this brief the details of this exhibit (*No. 69*) an examination of it, in connection with Mr. Morrison's testimony, will show that the Lehigh Coal Company paid for all stocks bought by it from Lehigh Railroad Company the full book values of the stocks at the time of purchase.

These book values were arrived at and were entered on the books of Railroad Company in the manner approved by the InterstateCommerce Commission.

(Record, 1405.)

The changes of book value from time to time were ascertained and entered at the end of Railroad Company's fiscal year.

These values were ascertained, and entered on the books of Railroad Company in each case so long before any sale of the stocks was made to Lehigh Coal Company as to preclude even a suspicion that the values arrived at were with a view to any of said sales.

At the times of sale, most of the stocks had been written down during the years in which Railroad Company held them,—from one to four years before they were sold.

In one case—Wyoming Coal and Land Company—the stock had been written up.

How these transactions can be tortured into gifts of money to this defendant, is incomprehensible.

(2) *Bonds of Lehigh Coal Co.*

In like manner, an examination of Railroad exhibit 69, Record 2334, answers fully the allegation of the Government as to preferences, or "advances," to Coal Company arising from the issuing of Coal Company bonds.

It appears in this statement, and in the testimony in connection with it, that in 1893 Railroad Company acquired first mortgage 5 per cent. bonds of the Coal Company to the amount of $10,500,000., and that in 1897 Railroad Company acquired second mortgage 5 per cent. bonds of the Coal Company to the amount of $5,000,000.

Of these first mortgage bonds $9,100,000. were sold in 1894 and 1895 to various parties.

For the balance of the issue of first mortgage bonds ($1,400,000.) this defendant paid the Railroad Company $1,330,000. in cash, together with its certificate of indebtedness for $70,000.

For the issue of $5,000,000. of second mortgage bonds this defendant gave to the Railroad Company its certificate of indebtedness for $5,000,000.

These second mortgage bonds were given by this defendant to the Railroad Company "in liquidation of advances previously made by the Railroad Company to this defendant for the purchase of new properties and for improvements."

(Record, 931.)

This money, therefore, went to the enhancement of the value of the stock of the defendant, all of which was held by the Railroad Company.

On that account this defendant was no more obligated, and in fact was no more able to pay interest upon the money secured by these bonds, than it was liable to pay a dividend, on its stock, which it could not earn.

As to the Coal Pledge Bonds (Govt. Brief, District Court, 106), this defendant gave to the Railroad Company its certificates of indebtedness at a time when the Railroad Company advanced the $2,050,000. to retire these bonds, and these certificates were for the full amount advanced.

(Record, 616 and 654.)

and 4 per cent. interest has been paid on the full amount of said certificates from their date, June 30, 1905.

(3) *Certificates of Indebtedness.*

In 1905, for entirely legitimate purposes, the Lehigh Coal Co. issued to the Lehigh Railroad Co.

certificates of indebtedness amounting in the aggregate to $10,537,000.

No matter what may be thought of the liability of the Coal Co. to pay interest on these certificates, which is a legal question not necessary to be determined in this case, the fact is that March 1, 1912, the Coal Co. paid up all back interest on these certificates, amounting, at four per cent., to $2,809,666., and at the same time, the amount of the certificates having been reduced by cash payments to $7,500,000.—the Lehigh Coal Co. took up the certificates outstanding, and issued therefor 50-year 4 per cent. bonds in the amount of $7,500,000.

The Government claims that this was not a *bona fide* transaction between independent corporations, (a) because the interest paid on the certificates was unreasonably low; (b) because only simple interest was paid; (c) because the interest on the new issue of bonds was unreasonably low, and (d) because the Lehigh Railroad Co. paid a premium for the bonds.

To substantiate the allegations that the interest paid on the certificates was unreasonably low, nothing is averred except only that the loan was unsecured, and the borrower was a mining corporation.

No proof has been offered to show that the responsibility of Lehigh Coal Co. as a mining corporation was not such as to practically secure repayment of the loan.

(Record, Vol. 3, 1681.)

As to the allegation that Lehigh Railroad Company should have collected compound interest on the certificates.

Compound interest cannot be collected by a creditor from his debtor under the laws of Pennsylvania, unless a new principal has been created. Under the laws of Pennsylvania "interest is never a legal incident to the non-payment of interest."

Stokely vs. Thompson, 34 Pa., p. 210.

Even a trustee, who advances his own money to pay the debts against the estate, cannot create a liability to pay compound interest, although for the purpose of creating new principal he have triennial accounts settled in his favor.

2 Grant (Pa.), page 281.

To substantiate the allegation that the interest rate on the new issue of bonds was unreasonably low, the Petition avers that "in every instance when Lehigh Coal Co. has issued bonds intended to be disposed of to persons other than Lehigh Railroad and its affiliated companies, the interest rate has been 5 per cent. or higher."

This allegation is flatly denied by Mr. Tompkins, who says that "there is an issue of $1,400,000 of 4 per cent. bonds outstanding now in the hands of the public." * * * and have been so outstanding since 1905 or 1906.

(Record, Vol. 3, 1681.)

No premium was paid by Lehigh Railroad Company for the new issue of 4 per cent. bonds—50 years indebtedness—as alleged in the Petition.

(Record, Vol. 3, 1351.)

(4) *Other Financial Transactions.*

All financial transactions between the two companies, other than those relating to stocks and bonds (as above), are fully set forth in Govt. Exhibit 50, Record, 683.

Every transaction of a financial nature, is set out in detail in *Railroad Exhibit 69, Record 2334,* and in *Govt. Exhibit 50, Record 683.*

The latter shows conclusively that all moneys advanced by Railroad Company to Coal Company for working capital, or for any other purpose whatsoever, have been fully repaid by this defendant, and had been fully repaid, long before this suit was brought.

To summarize this branch of the case, whatever may have been the financial transactions between Lehigh Railroad and Lehigh Coal Company they were always as between creditor and debtor, and they constitute no such intermingling of affairs as effects or tends to effect the separate identity and integrity of the two companies.

(4) *Markle Contract.*

This has been referred to as to some of its phases in prior portions of this brief, and will be again referred to hereinafter.

(5) *Sixty-five Per Cent. Contracts.*

Have already been explained in this brief.

Dissociation.

Of course there can be no dissociation where there has never been any prior association.

Unless, therefore, the Lehigh Railroad and the Lehigh Coal Company are identical, the Lehigh Railroad was never associated with the coal produced, or purchased, or taken for sale by the Lehigh Coal Co., and is not now associated with the coal produced by it.

Upon any other theory than that of identity of the two corporations, the Lehigh Railroad had no interest or ownership, or association with the coal which was being produced, bought or sold on commission by the Lehigh Coal Co., prior to March 1, 1912, and was in no sense, therefore, a party to the contract of that date.

Identity of Lehigh Railroad and Lehigh Coal Company will not be assumed in this brief, even for purposes of argument.

Absolutely no relationship between Lehigh Coal Co. and Lehigh Sales Co. has been shown, beyond that connected with the resolution preliminary to incorporation of the Sales Co. and that contained in the sales contract of March 1, 1912, and the admitted fact that one director of the Coal Co. is also upon the Board of the Sales Co. without dictation from any source, but solely upon the ground of his peculiar fitness for the position.

There is no relationship outside of carrier and shipper between the Lehigh Railroad Company and the Lehigh Sales Co. except that the stockholders of the Railroad Co. were given a right to subscribe to stock of the Sales Co. and many of them did so subscribe.

The relation of carrier and shipper is in all respects in accord with the ordinary.

The Sales Co. is in no way bound to ship any of its coal over Lehigh Railroad, but is absolutely free to ship at its own will, by means of transportation selected by it alone.

It pays the same freight as all other shippers of anthracite coal.

There is no pretense that the accounts or funds or business management or affairs generally, or specifically, of the Railroad Co. and the Sales Co. are intermingled.

The argument of the Government upon this branch of the case is built upon the assumption that "the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, and Coxe Bros. & Co., Inc., are virtually one and the same association of persons engaged in producing, selling and transporting anthracite coal."

This, of course, is absolutely necessary to enable the argument against *bona fide* dissociation of the Railroad prior to transportation.

It is absolutely necessary, also, because without that assumption the Railroad Company never would have been associated with the coal, which would seem to eliminate all argument as to the continuance or discontinuance of something which never existed.

Attention is called to the fact that the assumption of the identity of the three corporations named, is, so far as Coxe Bros. & Co., Inc., is concerned, based solely upon the stock ownership of Lehigh Railroad, and the fact that prior to May 26, 1913, the Coal Co. bought the coal of Coxe Bros. & Co., Inc., and the composition of the Board of Coxe Bros. & Co., Inc., all of which things in no way affect the question of separate identity.

Nevertheless, upon this bald assumption, the argument is made under three heads, as follows:

(a) Because of the circumstances of the organization of the Lehigh Valley Coal Sales Company.

(b) Because of its composition, &c.

(c) Because of the relations between the Railroad Company and the Sales Company arising from the contract of March 1, 1912, and the course of dealing thereunder.

To permit the implication that all these reasons together may support the contention of the Government, counsel, with apparent frankness, admitted in the Court below that "perhaps no one of these three reasons alone would be sufficient to repel the inference of dissociation and of parting with all interest, direct or indirect."

(Govt. Brief, in District Court, 257.)

The burden of the Petitioner is to repel something more than an inference, in this case.

It is seeking to set aside a contract which the parties had an undoubted legal right to enter into, upon no allegation of fraud beyond that which is involved in an assertion of lack of good faith in the purpose of the contract.

To do this, it is compelled not only to ignore the plain language of the contract itself, but also to disregard the conduct of the parties thereunder for more than four and one-half years, during which time the vendor has sold and delivered all its coal at the mines, and the vendee has taken it away and has paid the vendor for it under the terms of the contract.

That would seem to evidence,—something more than a mere inference, that the Lehigh Sales Co. by the contract of March 1, 1912, acquired absolute control and ownership of the coal at the mines, and absolute power to take it away to any place, and by any means that it saw fit, and to do with it everything which any owner of a commodity has a right to do with that commodity, and that since March 1, 1912, it has exercised its rights in that behalf.

If this is so, and it is not disputed, it is difficult to see how the Lehigh Coal Co. or the Lehigh Railroad Co. were possessed of any interest in the coal, direct or indirect, at the time of the beginning of its transportation.

In addition to this, is the proof of separate management, separate funds, and accounts, payrolls, employes, and generally speaking, separate affairs, referred to before in this brief.

Over and beyond that is the inference of independent corporate existence arising from separate charters, &c.

All of these things, and much more, must be swept away before it may be said that under the contract of March 1, 1912, the dissociation of Lehigh Coal Co. and thereby upon the Government theory, the dissociation of Lehigh Railroad Co. from the commodity, was not complete and in good faith, prior to the beginning of its transportation.

Lehigh Valley Coal Company has no interest in the price to be obtained for its coal which may be sold at New York harbor.

Under the contract of March 1, 1912, Lehigh Coal Company's price at the mines is not determined by the sale of its coal at New York harbor, and is entirely independent of the fact as to whether any of its coal is sold at that point, or not.

A fortiori: Lehigh Railroad has no interest in the price of coal sold at that point.

If it is meant that as a stockholder Lehigh Railroad has an interest in the price paid for the coal, the answer is the same, with the added answer that any interest which it might have as stockholder, is insufficient to give it an interest in the coal itself, either direct or indirect.

In the case at bar the Lehigh Railroad Company is not the vendor in the contract, and has no interest, as vendor, in the price received for the coal.

It cannot control the price at tide, and cannot increase that price.

It does not fix prices, nor decide how much coal is to go to New York harbor, and it has no power to determine, and does not determine where the coal shall go to, nor to fix the sum which shall be received for it at tide, or at any other point.

Equally, the Lehigh Coal Company has no power to fix prices, nor decide where the coal shall go to, nor to exercise any control over it after it parts with its title to it at the mines in Pennsylvania.

The remote interest which the Lehigh Railroad Company, as stockholder, has in the price received for the coal, is still further removed from that direct or indirect interest in the coal itself, which is forbidden by the statute.

But, say the learned counsel for the Complainant, the contract of March 1, 1912, was so improvident on the part of the Lehigh Coal Company as to warrant only one conclusion, to wit: that it was not a contract in good faith,—in effect, not a contract at all.

It was improvident, they say, because,

(1) The Lehigh Coal Company sold its stored coal at "unreasonably low" prices.

(2) For the first five years of the contract, the Lehigh Coal Company made annual decreasing allowances, or deductions from prices.

(3) Upon the theory that Lehigh Railroad and Lehigh Coal Company are identical, these reductions in prices were unlawful rebates, &c.

(4) It was improvident in its leases of coal storage plants, &c.

(5) Again upon the assumption that Lehigh Railroad Company and Lehigh Coal Company are identical, the only conclusion which can properly be drawn from the intention by the parties thereto to terminate the contract is that the Railroad Company at its will may destroy the sole business of the Sales Company,—wherefore, the Railroad Company and the Sales Company are legally identical.

Now, in taking up the contract of March 1, 1912, it is clear that to understand why it was made and why it took the form which it did, it is necessary to look into the situation as it then existed, and to consider the reasons which actuated the Lehigh Coal Company in the light of all of its surrounding circumstances, to take the step which it did in good faith so as to terminate its connection with the shipping of anthracite coal, and its sale throughout the United States and Canada, and confine itself to mining and disposing of its product at its own mines.

The Government objecting at first that the continued ownership of its stock by the Lehigh Railroad Co., although it was acquired fifteen years before the adoption of the Sherman Act, and twenty-one years before the passage of the Hepburn Act, was a menace to unfettered trade in interstate commerce in anthracite coal, had finally reached a point where it had made most serious accusations against the Lehigh Coal Co. in a successful effort to amend the petition in the case of the U. S. vs. D. & H. Co. et al.

It was to avoid this hostile attitude of the Government toward it, that, under advice of counsel, and by and with the knowledge and apparent assent of the then chief legal representative of the Government, the Lehigh Coal Company, in good faith, but without admission of prior offending on its part, resolved to have no more to do with interstate trade, and to sell all its coal, at its mines in the State of Pennsylvania, and to buy no coal for re-sale, and to ship no coal whatsoever.

While the Lehigh Coal Co. was not compelled by decree of Court, and therefore was not obliged to act "almost immediately," it is plain that there must come a time in the transaction when the entire separation from the old ways,—and the adoption of the new would have to take place as it were overnight, in order to avoid serious complications as to title, accounting, &c.

Storage Coal.

To illustrate, when that time came, the Lehigh Coal Co. had on hand about four hundred and ninety thousand (490,000) tons of coal in stock at a great number of different points, in different States. If it retained title to that coal, it would not only fail for a long time to cease being engaged in interstate trade, but it would be obliged to sell this coal to a large number of people, and it would take a long time, several months, to get rid of it, and it would have to be sold on time, with all the risk of bad debts, &c., and in addition to that a considerable

shrinkage in quantity arising from loss and reduction in the larger sizes which always accompanies storage and re-handling.

(Record, Vol. 3, 1682-1684.)

It sold that coal without deduction for loss in quantity, to the Lehigh Sales Co. for spot cash, at a discount of one-half of one per cent. from its book value.

It is upon such alleged "improvidence," that the Petitioner asks the Court to infer that the contract of March 1, 1912, was no contract at all.

(2) Deductions.

As to the annual deductions from price in decreasing amounts during the first five years of the contract of March 1, 1912, it is absolutely essential that the provisions be considered from the viewpoint of the parties at the time the contract was made.

Financial results different from those anticipated by the parties are of little or no value in determining the good faith of the contract and of the parties thereto, particularly where such results are caused by abnormal and unforeseen conditions, as in the case at bar, to wit: the suspension of mining in the year 1912.

The argument of the Government concedes that to deny dissociation "is not to reflect upon the integrity of those concerned in the transaction."

(Government Brief, 238, District Court.)

With this concession the only question apparently involved is the legal effect of the contract.

If it is an honest contract, and generally a contract which the parties had a legal right to make, then its legal effect cannot be changed by an allegation, or even by proof, that in its working out one of the parties thereto was able to secure a greater financial benefit than was originally intended or anticipated by the other party.

To emphasize this supposed immensity of the financial gain to the Lehigh Sales Company by reason of these deductions in prices, the Government asserts that it amounts to $1,000,000. a year.

Taking into account the modification of the contract as of April 1, 1914, by which the Sales Company pays to the Coal Company 2½ per cent. ad valorem on each ton of anthracite coal produced by the Coal Company and sold to the Sales Company, the average yearly result of the deductions for the five years during which they are to be made is about $440,000.

During the last five years of the contract the payments of 2½ per cent. ad valorem will offset

more than half the gain of the Sales Company from the deductions in price during the first five years.

It may well be argued that these payments by the Sales Company to the Coal Company were not contemplated by the parties at the time the bargain of March 1, 1912, was made.

They are referred to, however, not only as showing that, with knowledge of them, the Government brief grossly exaggerates the amount involved in the deductions, but also as showing that when, under the actual working out of the contract, it appeared that the gain to the Sales Company was greater than had been anticipated the Coal Company immediately took steps to secure a modification of the contract for its own protection, which it certainly would have no object in doing if the Coal Company and the Sales Company and the Railroad Company were all one and the same thing.

The modification referred to was not promptly granted by the Sales Company so as to indicate, as the Government contends, that all the Coal Company had to do was to command.

It was only after continuous insistence and because it was the fair and equitable thing to do, that the Sales Company finally yielded.

Let us go back, now, to the situation of the parties to the contract of March 1, 1912, as it existed at the time the contract was made.

The general situation has already been referred to, and the reasons inducing the action taken.

The Lehigh Coal Company insisted that the Sales Company should buy all its coal as produced, without regard to whether the Sales Company could market it or not.

There was no restriction of output.

It compelled the Sales Company to hold fast to all the markets into which the Coal Company had formerly gone, whether they were profitable or not, and to devote its sole and whole time and energy to developing these and all other markets, along with extensions into new markets.

The Lehigh Coal Company knew that in its own sales experience, for years prior to March, 1912, it had been required from lack of market demands, to store enormous tonnages of coal, and at the very time of the contract date, it had in storage four hundred and ninety thousand (490,000) tons of coal.

The cost of storage at the points available to the Coal Company, and after March 1, 1912, to the Sales Company, averaged about twenty-three (23) cents a ton, and this loss could never be recouped.

Mr. Skeele, who assisted in the negotiations leading up to the contract of March 1, 1912, knew all this equally well, for he had been the head of the sales department of the Coal Company.

This was one of the adverse conditions against which it was recognized that the Sales Company would be bound to contend, in all probability to an extent beyond that which had theretofore existed, because it was a certainty that the Coal Company would crowd its production under the contract beyond that which it had been when it was obliged to store its own coal, and the Sales Company was powerless to prevent this, being bound to take all of it as it came out of the breaker and to pay for it in cash monthly.

The Lehigh Coal Company knew that if it drove so hard a bargain with the Sales Company, as to make it impossible for the Sales Company to comply with it, the whole purpose of the Coal Company to be free from interstate trade, &c., would be thwarted.

It was entirely upon a business basis, and in view of the business difficulties with which the parties anticipated that the Sales Company would be beset, and to make a bargain that both parties could live under, that the concessions in prices were made.

That these anticipated difficulties were more than offset during the first year of the working out of the contract, by abnormal conditions, unforeseen and unforeseeable, so that for example, among other things, during that year the Sales Company was not obliged to store any coal at all, affords no grounds for argument that during the subsequent

years of the contract all of the business difficulties anticipated by the parties will not be present.

To assume otherwise, as the Government does, is an error, and to multiply that error by five or ten, gives an utterly wrong and exaggerated basis for any fair or sound argument.

It is respectfully submitted that there is no warrant for attributing these deductions to anything connected with transportation.

They are fairly accounted for as based upon business reasons totally disconnected with transportation.

In this matter, as in all others involved in this case, it is the contention of the Government that if several inferences may be drawn from facts admitted or proved, some of which are fair and legitimate, and one of which is unfair and criminal, the Court is at liberty to draw only the conclusion of unfairness and criminality.

Great ingenuity has been exercised by the learned counsel for the Government in this behalf, and to sustain this position, the most trifling matters have been brought forward as warranting the harshest inferences. A reply to these in detail would seem to be not only unnecessary, but in many cases, undignified.

The Markle Co. Contract.

The attitude of the Government toward this contract is best evidenced by the nature of the relief sought, to wit: that the contract be annulled "so that the defendant G. B. Markle Company, being relieved from the illegal restraint imposed by this contract, may be free to engage in competition as an independent corporation."

(Government Brief, 288, District Court.)

In view of the testimony of John Markle, president of the G. B. Markle Company, as to the absolute control of the Markle Company over this contract, and the coal to be sold by the agent by said contract created, it is clear that no restraint of any kind whatsoever is imposed upon the Markle Company, which retains its ownership of this coal, and retains and exercises the right to fix the prices at which it shall be sold by the agent, and the places where it shall be sold, and the persons to whom it shall be sold, and the methods by which it shall be transported.

(Record, 1590-1592.)

(Record, 1600.)

What greater freedom the Markle Company can be given, to engage in competition as an independent corporation, it is difficult to imagine.

It claims to have, and to exercise absolute freedom of competition, and to control its agent, which sells only on commission, as to every element of

production, transportation and sale which enters into free competition.

Its undisputed practices corroborate this claim.

Is it not paternalism run mad for the Government to say to this independent operator, "it is better for you that this contract be annulled, and all the facilities which you now enjoy of marketing your coal be taken away from you, so that you may, even though at great expense and loss to yourself, provide other facilities for that purpose, and may thus exercise an independence which you say you now enjoy, but which we, notwithstanding the evidence, suspect you do not?"

Undisputedly the Lehigh Coal Company has had nothing to do with this contract, or the coal covered by it, since March 1, 1912.

By the consent of the G. B. Markle Company, evidenced by its course of dealing since that time, the coal has been sold by another and a different agent.

The fact that the Markle Company still regards the original agent as financially liable for any breach of the contract on the part of the present agent, in no way affects the situation.

If it be true that there may be a well-founded claim against Lehigh Coal Company, as for a breach of this contract, that does not in any way

tend to prove that Lehigh Coal Company takes the Markle coal, nor that it has had anything to do with that coal since March 1, 1912.

When the Lehigh Coal Company decided to cease selling coal in interstate trade, one of the obstacles in its way was this Markle contract.

There was no way to terminate it before the time therein set for its expiration—1920.

To carry out its purpose, therefore, it was obliged to have the Markle Company assent to the substitution of another agent in its place.

This it did,—and this was all that possibly could be done under the circumstances.

(4) *Lease of Storage Plants, &c.*

It is not the purpose of this brief to follow the argument of the Government, as to the old leases of storage plants from Lehigh Railroad to Lehigh Coal Company, prior to February 23, 1912. The rates of rental in those leases were fixed long before the Railroad Company had an appraisal of its property.

As soon as it had an appraisal of land and structures covered by these leases, to afford some definite guide to its real estate department, these rentals were raised.

(3 Record, 1323.)

March 1, 1912, which marks the date of the cessation of the use of these plants by the Lehigh Coal Company, all the storage and stocking plants, trestles, docks, &c., used in the merchandising of coal, were leased to the Sales Company at rentals amounting to about 6.45 per cent. upon the value of the properties.

(4 Record, 2548.)

The Sales Company also pays cost of operations.

It never was the law that leases of this kind were illegal, or would be held to constitute unlawful preferences or to confer unlawful favors, even where the lessor was a carrier in interstate commerce, if the rentals reserved are fair and adequate.

(5) *Exclusive Dealing.*

Only upon the theory that the contract of March 1, 1912, is "not a contract between two ordinary dealers," and that "it is a contract by a dealer holding a virtual monopoly of the production and sale of anthracite coal within the territorial unit tributary to a particular railroad, designed to pass over to another dealer the monopoly which it has itself acquired, &c.," is it possible for the Government to build up the semblance of an argument that the reciprocally exclusive covenants of the contract in and of themselves restrain trade in violation of the Sherman Act.

As between man and man such covenants have always been held to be valid by the Courts, and not against public policy.

There is no warrant in this case for the assertion that the contract in question is not as between man and man.

Being, therefore, valid and legal and not opposed to public policy, nothing but the express provision of a statute forbidding the making of it will avail to set it aside.

There is no such statute.

Equally fallacious is the argument, based upon the unwarranted assumption of the "transfer of monopoly," that the effect is to foster and continue that monopoly.

The reasons are the same in both cases.

GENERAL SUMMARY—THE MONOPOLY ALLEGED.

How Acquired.

By acquiring "through Lehigh Coal Company" and "subsidiary companies," "large bodies of anthracite coal lands" adjacent to its lines of R. R. (a) by purchase or lease or merger.

(b) By purchase, "through Lehigh Coal Company of entire output of mines of" so-called independent operators reached by Lehigh Railroad.

(c) By acting as agent for G. B. Markle Company in sale of its output.

Alleged Violation by Lehigh Railroad of Commodities Clause.

(1) Intermingling of affairs of Railroad Company and Coal Company, so as to make Coal Company a "mere department" of Railroad Company.

(2) No *bona fide* "dissociation by the R. R. Co. from the coal prior to beginning of transportation."

It is clearly established in this case, (1) that Lehigh Railroad Co. and Lehigh Coal Co. are separate, independent corporations; (2) that Lehigh Railroad Co. never owned any coal lands along its line or elsewhere, and never mined a ton of coal; (3) that Lehigh Railroad Co. never owned any anthracite coal except what it bought and used under its boilers; (4) that Lehigh Railroad Co. never was, and is not now, both the owner and shipper of any anthracite coal; (5) that Lehigh Railroad Co. never was a competitor, as the owner of any anthracite coal, with others who shipped anthracite coal over its lines, or any of them; (6) that since March 1, 1912, the Lehigh Coal Co. has sold all its coal "f. o. b. the mines to the Lehigh Coal Sales Co."; (7) that neither the Lehigh Railroad Co. nor its alleged *alter ego*, the Lehigh Coal Co., has had since March 1, 1912, any title to any of the anthracite coal produced by the Lehigh Coal Co., or to any other anthracite coal after the beginning of trans-

portation over Lehigh Railroad; (8) that at no time has the Lehigh Railroad Co. ever had any interest in or control over the sale of any anthracite coal transported by it, and that since March 1, 1912, its alleged *alter ego*, the Lehigh Coal Co., has had no interest in, or control of any transportation or sales of anthracite coal outside the State of Pennsylvania.

None of the vital facts upon the assumption of which the argument for complainant proceeds, and the authorities therein referred to are cited, are present in the case at bar, and neither argument or authorities is applicable to this case.

The argument of counsel for the Government is also based upon the assumption of the identity of "public carrier and private shipper," and the proof in this case is that no such relationship exists, or ever has existed, so far as the Lehigh Railroad is concerned.

The argument rests also upon the proposition that Lehigh Railroad has combined its business of public carrier and private shipper to the point of monopolizing the production, transportation, and sale of anthracite coal from mines tributary to its lines.

This is an unsound argument, because (a) it obliterates the separate identity of Railroad Company and Coal Co ; (b) it assumes that such an intermingling of the affairs of the two companies has

been shown as warrants this obliteration,—which is not true; (c) it assumes that there is proof of the failure of R. R. Co. to dissociate itself from the coal prior to transportation,—which is not true; in fact it never was associated with the coal, and generally, (d) it assumes that the law has been violated because R. R. Co. transports the major part of the coal acquired by Coal Co. along its lines notwithstanding the fact that the total amount of said coal is less than 10 per cent. of the anthracite coal produced, sold and shipped by rail in Pennsylvania, and less than one-fifth of the anthracite coal produced, sold and shipped from lands adjacent to the lines of R. R. Co. and conveniently accessible thereto, and is so small a fraction of anthracite coal in each of the respective cases that it cannot be held to enable its owner, the Lehigh Coal Company, to fix prices, or restrict output or deteriorate the product, or restrain competition, and therefore cannot be used to create a monopoly, or to produce or threaten any of the evils of a monopoly.

One of the fallacies of the argument, which disregards the evidence to the contrary, is in the assumption that the final test of an unlawful monopoly lies in the proportion which the production of a commodity along the lines of a railroad bears to the quantity of that commodity carried by that railroad.

To illustrate, suppose a railroad along whose line there was a single small tract of land containing anthracite coal, upon which was an operation

producing an average of twenty tons daily, all of which (100 per cent.) was carried by the railroad outside the State, it could not be properly argued that this constituted a monopoly of anthracite coal in the district nor even a monopoly contrary to the Sherman Act, of the anthracite coal along the line of the railroad. Why?

Because the quantity produced is so small, as not to give power to the owner, to affect in any way the price of anthracite coal, or to fix even the price of that particular anthracite coal, in the sense of compelling a consumer to pay more for it than it is worth in the market, in competition with other anthracite, nor to empower the owner of it to restrict the product of anthracite coal so as to affect price, nor to deteriorate the anthracite product and force the deteriorated product upon the consumer, nor even to deteriorate the particular product.

If, however, the ultimate test is a comparison of the amount of such production to haul, then, since in the illustration made where it is concededly one hundred per cent., a monopoly would be established immediately,—a very peculiar monopoly,—that is to say, one without any of the evil results interdicted, or sought to be prevented by the Sherman Act.

In urging the absolute conclusiveness of the proportion reached by comparing the amount of alleged production of the Lehigh Coal Company and what are said to be its affiliated companies,

to the total tonnage of Lehigh Railroad for the fiscal year 1907, the Government asserts that it amounts to 57.29 per cent.

Without discussing the unfairness of making use of conditions which have not existed since March 1, 1912, in order to reach these figures, it is plain that even if the statement were correct, it would not establish the Government's contention.

Concededly, this percentage could be lessened by the diminution of purchased coal since 1907, and in all fairness the concession ought to go to the absolute cessation of purchased coal since March 1, 1912, but that would destroy the Government's argument.

The Government, however, by its own admission, has agreed that in the year 1907 the alleged control of anthracite coal by the Lehigh Railroad Company was less than one-fifth (1/5), to be exact, 16.87 per cent., of the coal alleged to be then controlled by six of the ten coal carying roads named in the present petition (Petition, 13-14).

See Petition in the case of *U. S. vs. Reading Company*, paragraph four, *U. S. vs. Reading Co., 183 Fed., 431.*

It is respectfully submitted, that this illustration demonstrates the fallacy of the argument of monopoly, etc., based upon a percentage of produc-

tion along the lines of a railroad, to haul of that production by the railroad.

The Hepburn Act.

Depends upon the question of whether there has been "dissociation by the R. R. Co.—(the Coal Co. acting)—with the coal prior to transportation."

This rests upon

(a) Whether the R. R. Co. ever was associated with the coal, by reason (1) of stock ownership, or (2) by such an intermingling of affairs, empowered by stock ownership, over and beyond that which ordinarily and naturally and properly flows from such relationship, as to make R. R. Co. and Coal Co. legally one as to mining, controlling, selling and shipping anthracite coal; (b) the *bona fides*, &c., of Lehigh Sales Co.'s organization and conduct of business thereunder which, if established, would dissociate the R. R. Co. from the coal prior to transportation, even though on the 1st of March, 1912, the R. R. Co. and Coal Co. were identical and not separate and distinct corporations, and even though the other alternative alleged were found to be true, to wit: that Coal Co. was a mere tool or instrumentality of the R. R. Co.

Stock ownership alone will not suffice to sustain the contention of the Government. No abuse of stock ownership by intermingling of affairs or otherwise has been proved. The attack upon the

good faith of the contract, and the alleged wrongful conduct of the parties thereunder, have both failed.

Separate identity of the corporations has been established.

The Government's case has gone no further than accusation, insinuation of wrong doing and fervent appeals to ignore the proofs and accept inferences, not warranted in equity or in law.

Respectfully submitted,

ALLAN MCCULLOH,
F. W. WHEATON,
Solicitors for Lehigh Valley Coal Company, defendant.

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NO. 6[redacted]1

IN THE

Supreme Court of the United States

October Term, 1916

THE UNITED STATES OF AMERICA,

Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY AND OTHERS,

Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Brief for Coxe Brothers and Company, Inc.

Raeder Press, Wilkes-Barre, Pa. 154195

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA, *Appellant,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY, *et al.*, *Appellee.*	October Term, 1916. No. 69.

BRIEF FOR COXE BROTHERS & COMPANY, INC.

STATEMENT OF FACTS.

Coxe Bros. & Co. is a corporation chartered under the laws of Pennsylvania.

The capital stock is owned by the Lehigh Railroad Company.

It holds in fee and by leases about 36,490 acres of land in the anthracite producing regions of Pennsylvania.

Of this acreage it is estimated that about 7,169 acres contain more or less anthracite coal.

The petition claims that "over 5,300 acres of anthracite bearing lands" are held by it.

The rest is barren land.

This fairly illustrates how unreliable a statement of mere acreage really is, as bearing upon the amount of coal which can be produced.

It sounds like an enormous acquisition to state that a coal company has nearly forty thousand acres of land in the anthracite districts of Pennsylvania, but when, as is often the case, and as is the case with Coxe Bros. & Co., Inc., only from one-seventh to one-fifth of the lands contains any coal, the error of taking mere acreage as a basis for amount of coal which can be produced is perfectly apparent.

The operations of Coxe Bros. & Co., Inc., are at Drifton, Eckley, Stockton, Beaver Meadow and Tomhicken.

(Petition, 29.)
(Answer, 3.)

These places are all in Luzerne County, Pennsylvania.

Oneida breaker, the only one in Schuylkill County, was abandoned many years ago.

It is true that a small portion of its lands overlap the County line between Luzerne and Schuylkill Counties, and therefore, small portions of a few single tracts of land are in the County of Schuylkill.

It is submitted that this circumstance in no wise affected the right of the Lehigh Coal Company to purchase the stock of Coxe Bros. & Co., Inc., which was conferred by the Pennsylvania statute.

(Act of 1869, P. L. 31.)
(Record, 4 Rec., 2171.)

To put so narrow a construction upon the proviso to the Act of 1869 as is contended for by the Government would destroy the purpose for which the Act was passed.

Many coal companies were in existence in Pennsylvania in 1869, chartered under general or special laws, which possessed the abstract right if they saw fit to exercise it, to go into Schuylkill County and mine coal, or to go anywhere else in the State for the same purpose.

There were also at the same time coal companies possessing and enjoying the right to mine coal in Schuylkill County,—whose lands and mining property and operations were in Schuylkill County, so that they were known as Schuylkill County companies.

It was to the latter class alone, that the proviso to the Act of 1869, was intended to apply.

It is also an improper construction of the proviso to the Act of 1869, to say that if a railroad or canal company has acquired by purchase the stock of a coal company having no lands or mining property or operation in Schuylkill County, and years afterwards that coal company acquires lands, &c., in said County, the proviso immediately attaches so as to make unlawful the conduct of the coal company or of the railroad company.

The proviso applies only to well understood existing conditions either in 1869 or at the time the stock is acquired thereunder, or the other acts are done which are therein authorized.

Coxe Bros. & Co. is a mining corporation, and nothing else.

Prior to May 26, 1913, it was under contract to sell its output at the mines to the Lehigh Coal Company.

After March 1, 1912, and down to May 26, 1913, this coal was turned over to Lehigh Sales Company at the mines in Pennsylvania and by said Sales Company was accepted and shipped to market.

After May 26, 1913, the contract with Lehigh Coal Company having been cancelled by decree of the United States Court, said Lehigh Coal Co. has had nothing whatever to do with this coal, which has been and now is sold by Coxe Bros. &

Co., Inc., at the mines and there delivered to Lehigh Sales Company.

This defendant is not now, and never has been engaged in interstate trade or commerce.

Argument.

Questions of identity of the corporation with Lehigh Railroad and Lehigh Coal Co. have been necessarily treated in the briefs filed in this case in behalf of those companies.

There is no relationship between Lehigh Coal Co. and Coxe Bros. & Co., Inc., except such as is admitted as to partial identity of board members.

No intermingling of the "affairs" of Coxe Bros. & Co., Inc., with either of said corporations is attempted to be proved.

The only relation between Coxe Bros. & Co., Inc., and the Lehigh Railroad is the admitted one of stock ownership of the former by the latter.

Coxe Bros. & Co., Inc., cannot possibly by itself, nor in conjunction with Lehigh Coal Company, exercise any restraint of trade in anthracite coal, nor any monopoly thereof, nor any control over such a part thereof as can constitute a monopoly, even if it desired so to do.

Its total production is altogether too small to achieve any such result, either by itself, or in connection with the coal produced by Lehigh Coal Co.

Its percentage of production, as well as the percentages reached by adding its coal to the coal produced by Lehigh Coal Co.,—including coal under the New York & Middle lease, are set out in Lehigh Coal Company's exhibits Nos. 7 and 8.

(Record, pp. 2653-4.)

These exhibits are attached to and made part of the answer of Lehigh Coal Co. in this case.

To summarize, therefore,

(1) Coxe Bros. & Co., Inc., is a separate, independent mining company, neither dominated nor controlled by any outside influences.

(2) It has never been engaged in interstate trade or commerce.

(3) Neither by itself, nor in combination with the other defendants has it ever restrained or attempted to restrain, or been able to restrain competition in anthracite coal nor in any part thereof.

(4) Neither by itself nor in combination with the other defendants has it ever monopolized or attempted to monopolize, or has it been able to monopolize anthracite coal, nor such part thereof as is adjacent to the lines of Lehigh Railroad Company.

In considering the questions involved in this case, it is necessary to take into account the undisputed facts as to the well defined extent of the commodity; its nature and location; the methods which are required to get it out of the ground; the fact that it is destroyed by the progress of the business; that it is not a renewing thing, and cannot be manufactured; the length of time during which that destruction has been going on; the extent and effect of exhaustion, either partial or total; the fact that appreciable additional acquisitions are impossible, &c., because all of those things throw light not only upon what has been done, and is now being done with relation to acquisition, control, &c., but also upon what can or cannot be done in this direction in the future.

(Record, 1476-1589.)

They also throw light in other ways upon all of the questions involved.

To illustrate,—anthracite coal is in veins or seams, of varying thickness and quality, which underlie the valleys, narrow or wide, like elongated saucers, the edges cropping out or coming to the surface on the sides of the mountains between which the valleys lie.

The number of veins, their thickness, their character, the thicknesses and character of intervening and overlying strata differ and vary, not only in different sections, but markedly so in the same section.

For example, in one tract of land, of small area, —say a farm—there will be veins or seams of coal which do not exist under the immediately adjoining tracts.

In some cases the top vein is within thirty or forty feet of the surface, with no overlying rock, and the coal has to be reached by taking off the top soil and practically quarrying the coal.

In other cases, the top vein lies three or four hundred feet below the surface, with an overlying stratum of clay, rock, &c., and sometimes quicksand.

There is no uniformity of deposit, either as to quantity, or quality, or character or location, in the ground.

Even in cases where once there appears to have been some such thing, great convulsions and upheavals of nature have disturbed and changed it, or destroyed it altogether.

It must be borne in mind that all these things have been found out by actual development in the progress of actual mining.

At first, absolutely nothing could be known as to quantity, quality and character of underlying coal, the extent of deposit, its depth below the surface, its condition, if there at all, the nature of intervening and overlying strata, etc.

It was something out of sight, underground, which required time and labor and great expenditure of money first to find out whether it was there at all, or not, and after that, if it were there, to get it out and prepare it for market.

Even at this time, there is no sure way to find out with any degree of certainty many of the conditions above enumerated.

In view of these difficulties, and many others, perfectly apparent, but too numerous to be set forth in a brief, and because of the uniform failure of those individuals, and associations of men who were the pioneers in attempting to develop the production of anthracite coal, that policy of the State of Pennsylvania within whose boundaries lies practically all of it that there is on earth, was developed, which invited the railroads and canals of the State to put their money into this development, and give their credit to it, and extend their lines into the region of that development, to facilitate and hasten and increase it, by getting this commodity out of the ground and to market.

It is mater of history, that the existence of anthracite deposits, and that it was usable as fuel, was known in the latter part of the 18th century.

From the beginning of the 19th century efforts were constantly made to develop its production, transportation and sale.

As early as 1818, the State began to recognize the importance to the public of pushing this development.

It was not, however, until the last quarter of the 19th century, after the passage of the Pennsylvania statute of 1889, inviting the railroads to aid in this development, that any real progress was made, and that progress, brought about by the railroads upon the invitation of the State, and involving the expenditure of vast sums of money and enormous investments in the securities authorized by the Act, and costly extensions of lines, branches and sidings, &c., has been the chief factor in making the State of Pennsylvania the most prosperous Commonwealth in the United States.

All of it is now attempted to be used in this case, as evidence of criminality.

In developing a mining operation, by any method—as by drift, slope or shaft—the coal is so reached as to allow mining up to the pitch of the vein; so that the coal, when blasted, will run down, or can be brought down to the cars into which it is to be loaded inside the mine, and toward the gangway through which those cars will go to reach the foot of the drift, slope or shaft up which it is hoisted to get to the surface.

By far the greater number of mining plants, therefore, are out at the *foot* of the mountains, or partly up the mountainside, in places where at the

beginning of the operations there were no settlements, and where, particularly in the Schuylkill and Carbon County districts, the country for miles around is barren and unproductive, and of course, unsettled.

(Record, 142a.)

There is no reason on earth why a railroad should go there at all except to get the haul of the coal.

Take, for example, the Austin breaker branch of the Lehigh Railroad, some seven miles in length, running, as the maps in this case show, from Coxton yard to the Austin breaker.

There is hardly a house along its entire length.

There was absolutely no passenger traffic or other consideration to induce the Lehigh Railroad to build this branch, and to expend the amount of money necessary to construct and maintain it, except to get the haul of the coal produced at the Austin breaker.

Under such circumstances, the Supreme Court of Pennsylvania holds that a contract between the producing company and the railroad that the latter should have all of the former's traffic, is a valid contract, enforceable in equity, and is neither discriminatory nor in restraint of trade.

"It is not in restraint of trade, for its express purpose and necessary effect are to increase both trade and population; not a single traveler or shipper outside the contracting party is affected in his selection of a route; the contract binds none of them."

R. R. Co. vs. R. R. Co., 171 Pa., 284 (299).

From natural conditions of location, therefore, and in many cases by reason of actual physical necessity, and because it does not restrain trade but to the contrary increases it, without injecting any element of discrimination, the building of branches, extensions, breaker tracks, &c., to the various operations with which it is connected, even though it alone serve them, does not constitute unlawful, or discriminatory conduct, or conduct in restraint of trade, by the Lehigh Railroad Company.

Out of all the operations in the Wyoming region, the Government was able to find only one instance in which it appeared to be physically possible for two railroads to serve a breaker at the same time—Plymouth Coal Co.'s breaker at Luzerne—and even in that case it does not appear clearly how it is done.

It may be conceded, however, that there are cases in which such service is physically possible, but it is asserted with confidence that it requires unique location, and unusual construction, to reach such a result.

Evidence of things done prior to the enactment of the Sherman Act are only of value as showing a continuance of such conduct since the Act, if such there was, as is forbidden by the statute.

Even if it be made to appear that at any time before the bringing of suit there was conduct forbidden by the Act, if it also appears that there has been no such conduct for many years,—that it ended so far back as would be beyond the statutes of limitation, certainly no decree should now be entered to stop that which is already stopped, and as to which there is no menace for the future.

When the conduct criticised was not only lawful at the time, but was invited by the law, and was entered upon with the avowed purpose and necessary effect of increasing trade and affording opportunity for competition, and has not produced, and cannot produce, any of the evils forbidden by the Sherman Act, the language of the Supreme Court of Pennsylvania in the Nittany case, directed to the defendant in that case, would seem fairly to apply to the defendants in this case:

"It is not seldom those who have reaped benefits from a contract such as this seek to escape its obligation by taking refuge in that assumed turpitude which, on grounds of public policy, avoids the contract; but here, and it is a gratification to us to say it, the parties to the contract violated no law,

restrained not others from engaging in business, did nothing of evil example or detrimental to public morals."

(171 Pa., 299.)

Respectfully submitted,

ALLAN McCULLOH,
F. W. WHEATON,
Solicitors for Coxe Bros. & Co., Inc.,
Defendant.

Office Supreme Court, U. S.
FILED
OCT 4 1919
JAMES D. MAHER,
CLERK.

No. 1.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, *Appellant,*

vs.

LEHIGH VALLEY RAILROAD COMPANY, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply by the Following Defendants to the Additional Brief For the United States,

Lehigh Valley Railroad Company, Delaware, Susquehanna & Schuylkill Railroad Company and the individual defendants.

EDGAR H. BOLES,
Solicitor for Said Defendants.

Arthur W. Cross, Law Printer, Newark, N. J.

IN THE

Supreme Court of the United States

October Term, 1919.

UNITED STATES OF AMERICA, *Appellant*, *v.* LEHIGH VALLEY RAILROAD COMPANY, *et al.*	*No. 1.*

Appeal from the District Court of the United States for the Southern District of New York.

Reply to the Additional Brief for the United States.

The United States, in this additional brief, takes no position different from the position heretofore taken by it in the brief now on file with this record, and the "additional brief" filed at this term cannot, in justice to the defendants, be replied to in a condensed form. The case has twice been argued at length before this court and the brief heretofore filed on behalf of the stated defendants is now fully relied upon. As far as any epitome can appropriately be made, it is contained on pages 2 to 6, both inclusive, in the brief filed with this court at the October Term, 1916, Docket No. 69.

As to the imposing list of names and descriptions of coal companies, recited in the Government's brief filed at this term, the stocks of

which were from time to time acquired by the Lehigh Valley Railroad Company, we must refer to a similar presentation to this court respecting the acquisition of inventions and patents in the *United Shoe Machinery Co.* case, 247 U. S. 32, and suitably quote the answer of the court thereto, reported on page 54, namely: "They give a false impression by their number."

With respect to the question of intent and the extensive discussion respecting the history of the Lehigh Valley Railroad Company in the brief for these defendants filed at the October Term, 1916, we offer the additional thought, expressed by this court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238: "• • • knowledge of intent may help the court to interpret facts and to predict consequences." The intent which actuated the Lehigh Valley Railroad Company in the course of its conduct from the time of its creation is a highly important element in the consideration of this case. Moreover, the Government has been unable to show the slightest result contrary to the public interest in all that has been done. These two factors taken together, namely: the intent and the lack of an injurious result, or more appropriately stated, the actual positive and demonstrated beneficial result to the public, ought to be conclusive to sustain the judgment of the District Court.

It is respectfully insisted that the decree below should be affirmed.

Respectfully submitted,

EDGAR H. BOLES,
Solicitor for Defendants Stated.

October, 1919.

Office Supreme Court, U. S.
FILED
OCT 7 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 1.

UNITED STATES OF AMERICA, APPELLANT,

vs.

LEHIGH VALLEY RAILROAD COMPANY *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ADDITIONAL BRIEF FOR THE LEHIGH VALLEY COAL SALES COMPANY.

NICHOLAS W. HACKER,
Solicitor.

The Hecla Press, 57 ...rren St., N. Y. Tel. 6280 Barclay.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Appellant,

against

LEHIGH VALLEY COAL SALES COMPANY, impleaded with LEHIGH VALLEY RAILROAD COMPANY, LEHIGH VALLEY COAL COMPANY and others. } No. 1.

ADDITIONAL BRIEF FOR LEHIGH VALLEY COAL SALES COMPANY.

In view of the fact that the learned Solicitor-General has filed an additional brief in this cause, I deem it my duty to submit the following on behalf of my client Lehigh Valley Coal Sales Company.

Statement.

The Lehigh Valley Coal Sales Company was organized in March, 1912, for the purpose of enabling it to acquire the selling end of the anthracite coal

business theretofore carried on by Lehigh Valley Coal Company and immediately upon its organization entered into a contract with the Coal Company to buy the entire output of the mines of the Coal Company at the mine. It leased the various facilities for handling and storing coal that the Coal Company had and also acquired by assignment or sublease certain facilities which the Railroad Company had leased to the Coal Company. The Stock of the Sales Company was originally subscribed, in the main, by stockholders of the Railroad Company. The means to pay for which stock was provided to these stockholders by the declaration and payment of a dividend to them by the Railroad Company.

On March 1, 1912, the Sales Company entered upon the performance of this contract, bought and paid for the coal as it was mined by the Coal Company at the mines, took over the various properties and facilities above referred to, and started and has continued in business from that time on.

The Prayer of the Petition.

The prayer of the petition of the Government in so far as it relates to this defendant asked that this defendant (together with the other defendants) be adjudged

> "to have been and are engaged in combinations and conspiracies in restraint of interstate and foreign trade and commerce in anthracite coal and have attempted to monopolize and have been and are monopolizing a part of said trade and commerce. * * * that they and their officers, directors and agents be perpetually enjoined from further

carrying out or maintaining said conspiracies, combinations, attempts to monopolize and monopolizations or any others of like character and effect."

Further:

"That the contracts under which defendants Lehigh Coal Company and Lehigh Coal Sales Company purchase as aforesaid the output of other producers be cancelled and that such purchases in the future be enjoined; * * * that it be adjudged that Lehigh Coal Sales Company is not a *bona fide* independent corporation but a mere instrumentality of the stockholders of Lehigh Railroad and that the transportation for Lehigh Coal Sales Company by Lehigh Railroad of anthracite coal not necessary and intended for its use as a common carrier is in violation of the aforesaid commodity clause of the act to regulate commerce and that such transportation be enjoined so long as stockholders of Lehigh Railroad constitute also the controlling stockholders of Lehigh Coal Sales Company. That it be adjudged that the arrangements and agreements between defendants Lehigh Railroad, Lehigh Coal Company and Lehigh Coal Sales Company including the purchase contract dated March 1, 1912 between Lehigh Coal Company and Lehigh Coal Sales Company and the contract of lease of the same date between the same parties constitute a contract and combination in restraint of interstate and foreign trade and commerce in anthracite coal in violation of the aforesaid act of July 2, 1890; and that they be annulled and that the parties be enjoined from entering into any similar arrangements and agreements so long as Lehigh Railroad or stockholders thereof are the controlling stockholders of either Lehigh

Coal Company or Lehigh Coal Sales Company."

Upon the trial of the issues raised by the pleadings herein the lower Court dismissed the petition.

THE CHARGE THAT THE COAL COMPANY COULD LIMIT AMOUNT OF COAL TO SALES COMPANY.

The learned counsel in his additional brief has sought to show by an incomplete extract from the contract of March 1, 1912, that the Coal Company can limit the amount of coal which can lawfully be demanded of it under the terms of the contract. The clause referred to is:

> "The mining company reserves the right to retain all coal required by it for its own use, this to include the right to stock such quantity of coal of various sizes as it may deem desirable, anticipating suspensions or other interferences with mining operations, or for any other purpose it sees fit, among others, the necessary amount for the operations of its mines, maintenance and operations of its pumps, etc., as well as all coal which it may desire to retain for the use of the Lehigh Valley Railroad Company for the operation of its owned, leased, and controlled lines in the conduct of its or their business as common carriers."

When read in its entirety, the intent of this paragraph would seem to be very plain and easily understood. Aside from the coal to be sold to the Lehigh Valley Railroad Company, it could only retain coal required for its own use and this limitation is not enlarged by the use of the words "or for any other purpose it sees fit" as this "purpose" only means that which is consistent with the rest of the para-

graph as well as with the obligation already assumed to use its best efforts to increase its production and deliveries of said coal to the Sales Company. Indeed, the intent of the contract is explicitly stated in the following words, "The purpose and intent in this contract is to insure all reasonable efforts on the part of the Mining Company to prepare and furnish to the Sales Company all the coal that it can reasonably arrange to deliver either from its own mines or by purchase, and on the part of the Sales Company to give its undivided attention to develop and increase the sales of coal delivered to it in the future by the Mining Company such increase in quantity as it hopes the Mining Company can be able to furnish and deliver." The contract must be considered in its entirety and it is respectfully submitted that when that is done the construction placed by the learned counsel upon the isolated paragraph above quoted is unwarranted and his deductions therefrom are unsound.

Our Case Under the Decision in the Lackawanna Case.

Since the instant case was tried this Court has decided the case of the *United States of America* v. *D. L. & W. Railroad et al.*, 238 U. S., 516. Under that decision it would seem that the prime contention of the Government that a unity of stock interest in whole or in part would not be taken as the test by which to determine the legality of the contract. Also that the method of organization of the Sales Company is not open to attack. Therefore it would seem that the only question to be determined in this action so far as it affects the Sales

Company is whether or not the contract of March 1, 1912, was a *bona fide* contract and whether there was an actual free, independent and uncontrolled corporation owning and disposing of the coal prior to its entering into interstate commerce.

While the contract in question was an exclusive one, the limitation upon the Sales Company not to purchase coal from others was far different from a provision criticised by the Court in the *Lackawanna* case. In the latter case, "the Coal Company was not to buy coal from any other person or corporation without the written consent of the railroad company." In the instant case the provision was far different and is as follows: "So long as the Mining Company is ready and willing to deliver to the Sales Company coal under this contract, the Sales Company shall sell no other coal or fuels for itself or for any other persons outside of that which will require to be sold to comply with the terms of the existing hereinbefore recited Sales agency and other sales contracts of the Mining Company." In the *Lackawanna* case, "The Coal Company was to conduct the selling of the coal so as best to conserve the interests, good-will and markets of the coal mined by the railroad company." In the instant case, "The Sales Company agrees to use its best efforts to develop trade and increase its sales and widen its markets for the coal and the Mining Company agrees to use its best efforts to increase its production and deliveries to the Sales Company whether from its own mines or from the coal which it may purchase." In the *Lackawanna* case, "The Coal Company was to continue to fill the orders of present responsible customers of the railroad company even if some of such sales might be unprofit-

able." In the instant case no such provision appears.

The *Lackawanna* case seemed to turn upon two clauses of the contract, namely, the 65 per cent. clause and the right of the Railroad Company to restrict the amount of coal which it might sell to the Coal Company. In the first place, the contract under consideration here is not with the Railroad Company, but is with the Lehigh Valley Coal Company, a separate legal entity. Again no such restricted provision, as has already been shown, appears in this contract, and while it is true that the price to be paid upon so-called prepared sizes was 65 per cent. of the tidewater prices, that does not mean that it was 65 per cent. of the price obtained by the Sales Company at tide, but 65 per cent. of the price obtained at tide by all shippers of those sizes of coal, and as has already been shown in briefs heretofore filed, only about 12 per cent. of the coal of this defendant comes to tide, and with the seven or eight carriers of anthracite coal to tide operating from the different fields it cannot be seriously claimed that any restriction upon the shipments over the line of this particular railroad would materially affect the price of the coal at tide. Furthermore, the Coal Company absolutely agreed to use its best efforts to mine all of the coal that it reasonably could and the reciprocal obligation was assumed by the Sales Company to sell all of this coal and it was restricted to no particular market. It is a matter of common knowledge and one that has been considered by this Court more than once that railroad cars are alloted to mines upon the basis of the production of coal at each mine and that with the obligation upon the part of the Sales Company to find a market for all of this coal it was at

all times within its power to invoke the power of the law to compel the Railroad Company to furnish the necessary equipment for the transportation of the coal and especially is this true where the Sales Company was under no sort of restraint or restriction with respect to the distribution of the coal after it had acquired title thereto at the mines. No evidence of any failure to supply cars by the Lehigh Railroad was produced by the complainant.

During all of the time that this contract has been in force and effect the carrier has been under the jurisdiction of the Interstate Commerce Commission, except during the period of Federal control, which is probably transitory, where its rates have at all times been subject to the approval of the Commission (even during the period of Federal control, while the power to fix rates in the first instance was vested in the President of the United States, the right to review was still lodged with the Interstate Commerce Commission) so that at no time could the Railroad Company exercise the slightest influence upon the transportation of this coal by any effort to so manipulate its rates as to restrict the transportation. Therefore, the suggestion that by restricting the movement of coal from the mines to tide the price might thereby be enhanced and it receive a necessarily larger price per ton, is wholly without merit. Of course, in our case, even though such a thing had been possible, the railroad could only have derived a benefit therefrom by reason of the fact that it was the owner of the stock of the Coal Company. In other words, if the condition criticised in the *Lackawanna* case could exist in the instant case, it would have been the Coal Company that would profit by that method, which profit might or might not be ultimately reflected in

dividends to the Coal Company's stockholders. It will be remembered that the Coal Company had never paid a dividend.

It seems very clear that the Coal Company intended in good faith to produce all the coal that its mines were capable of producing and sell and deliver such coal to the Sales Company from day to day in order to supply the demand throughout the United States and this was to the interest of both parties. The Coal Company cannot make any money by allowing its mines to stand idle or by restricting its output, neither can the Sales Company make any money unless it is able to supply the reasonable demands of the public. That they both intended to do these things in good faith, which it was their interest to do, is very apparent from even a cursory examination of the contract in question and of their respective performance under it.

The criticism that the railroad company had leased certain sidetracks and trestles to the Coal Company for the purpose of enabling the Coal Company to handle its coal, which leases were assigned to the Sales Company, affords no just ground of complaint. The leasing of facilities to shippers throughout the country by every railroad is a common every-day transaction and where an adequate rental is paid no law is violated. The Coal Company intended by entering into this contract to entirely dissociate itself from the sale and distribution of its coal throughout the United States and to confine itself, with the exception of a negligible amount of local trade at its mines and fuel for the Lehigh Valley Railroad to the business of mining and selling its coal to one customer. Therefore, it had no further use for any of the facilities which it owned throughout the country or held under a lease from

the Lehigh Valley Railroad Company or any other person or corporation and the logical thing, the reasonable thing for it to do, was to assign or sublet all these various properties and facilities to the concern that was then going into the business of selling anthracite coal in all the territory heretofore covered by the Coal Company.

To now hold that the mere leasing of railroad sidetracks and trestles by railroad companies to shippers is illegal would be to upset a practice which has prevailed from the very inception of railroads in the United States.

The Sales Company paid full tariff rates everywhere not only to the Lehigh Valley Railroad, but to all other railroads, and as has been stated in the main brief, the amount of money paid to other carriers was many times that paid to the Lehigh Valley Railroad.

Summary.

Therefore let us briefly summarize wherein the instant case differs from the *Lackawanna* case.

1. The contract is made with the Coal Company and not with the Railroad Company.

2. The contract as between the Coal Company and the Sales Company is wholly performed by both parties in the State of Pennsylvania. That is, the coal is delivered by the Coal Company to the Sales Company in the State of Pennsylvania, where the title passes absolutely and wholly to the Sales Company and the payments therefor are made to the Coal Company by the Sales Company in the State of Pennsylvania.

3. There are no officers in common. Mr. L. D. Smith was an officer of the Railroad Company, but not of the coal company nor was he a director of the Railroad Company.

4. The entire organization of the Sales Company is separate and distinct from both the Coal Company and the Railroad Company.

5. The location of the office of the Sales Company is in a different building from that of the Railroad Company and in a different city and state from that of the Coal Company.

6. The Coal Company absolutely obligates itself to produce and deliver at the mines all of the coal it can mine.

7. There are no restrictions upon the Sales Company as to where it shall sell the coal, to whom it shall sell the coal, nor at what price it shall sell the coal.

8. The Sales Company obligates itself to use its best efforts to dispose of all the coal that the Coal Company can produce and deliver to it and to enlarge its (not the Coal Company's) markets.

9. The price to be paid upon the principal sizes is 65 per cent. of the general average free on board price for all sizes above pea coal received at tide points at or near New York between Perth Amboy and Edgewater and this was specified to be the average price of all the coal sold during the month from all the regions and by all the shippers to this port.

The brief already on file in behalf of this defendant is relied upon as stating fully the argument in its behalf and is respectfully referred to.

CONCLUSION.

It is respectfully submitted that the decree of the District Court should be affirmed.

NICHOLAS W. HACKER,
For Lehigh Valley Coal Sales Co.

OCT 7
JAMES D. MAHER,
CLERK.

NO. 1

In the Supreme Court of the United States

October Term, 1919

UNITED STATES OF AMERICA,

Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY et al.

Appeal from the District Court of the United States for the Southern District of New York.

Additional Brief for the Lehigh Coal Company.

Reader Press, Wilkes-Barre, Pa. 10920

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, *Appellant,*
vs.
LEHIGH RAILROAD COMPANY, ET AL. } No. 1.

Appeal from District Court of the United States for Southern District of New York.

ADDITIONAL BRIEF FOR LEHIGH COAL COMPANY.

The additional brief for the United States, so far as Lehigh Coal Company is concerned, goes not further than to restate the former argument of the Government.

Starting with Lehigh Coal Company's admission that all its capital stock has always been owned by Lehigh Railroad Company, the brief concedes that such ownership, without more, does not constitute the Railroad Company the owner of an interest in the property of the Coal Company

within the meaning of the commodities clause of the Hepburn Act.

Additional Brief for United States, page 12.

The learned counsel for the Government thereupon allege complete domination of the Coal Company by the Railroad Company, and aver that such domination was assumed to exist by the district judge.

But the learned judge of the District Court, having in mind the full extent of the domination which existed and its effect, distinctly held that notwithstanding this, no monopoly existed because of the control of the small portion of anthracite acreage acquired by Railroad Company and Coal Company, and that no monopoly of carriage had been established by reason of the transportation of a correspondingly small proportion of all the coal carried by all carriers.

Record, Vol. V., page 232.

Adverting then to the Government's contention that the unlawful monopoly existed only in a certain territorial unit, to wit,—lands adjacent to the railroad—which is the full extent of the Government's claim in this case, the learned judge of the District Court says that this claim will not bear investigation, in his opinion, because all that it amounts to is this:

"The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce, for said relations begin, exist and end within the limits of the State of Pennsylvania, and are there entirely legal."

Notwithstanding these findings in the Court below, amply justified by the evidence, as far as facts are concerned, the additional brief for the United States still continues to point out by name and deed acreage, what counsel claim to be abnormal and enormous acquisitions of coal lands.

The list is apparently formidable, but, the learned counsel for the Government have fallen into error in the matter in the following particulars:

1. The areas acquired are stated in superficial acres, and are far in excess of the acreage in which there is any anthracite coal.

2. There are duplications of superficial acreage, in some instances, which mistakenly increase the extent of acquisition.

3. All of the alleged acquisitions beginning with the year 1868, and coming down to the year 1906, are treated in the argument without any re-

gard whatever to exhaustion by the mining of the coal, but just as if the Coal Company had the power to produce from the entire acreage the same quantity of coal to-day, and hereafter during an indefinite future, that could have been originally produced from the lands.

Taking these mistakes up in the order named:

See List, page 8.

Additional Brief for United States.

(1) DELANO LANDS.

Of the 5,800 acres, only 2,511 acres are within the coal measures. The rest are barren lands.

HUMBOLDT LANDS.

Of the 5,087 acres, only 428 acres are within the coal measures. The rest are barren lands.

A. PARDEE & CO.

Of the 2,000 acres, only 1,280 acres are within the coal measures. The rest are barren lands.

These are part of the lands originally of the Hazleton Coal Company, said in the Additional Brief, page 3, to contain 3,020 acres. All of these lands in excess of 1,280 acres, proved to be barren.

JOHN C. HAYDON & CO.

Of the 781 acres, only 598 acres contain any coal.

CONNELL COAL CO.

The correct superficial acreage is 216 acres, of which 139 acres contain some coal. The rest is barren.

SENECA COAL CO.

Of the 1,322.6 acres, 1,122.6 contain some coal.

COXE BROS. & CO., INC.

Of the 36,490 acres, only 5,694 acres contain any coal.

SUMMARY.

The acres of coal alleged by the Government in the list of acquisitions, (page 8, Additional Brief for the U. S.) exceed the actual acquisition by 39,984 acres.

(See Gov't Ex. 120.)

(Record, Vol. 7, pages 975-986.)

(2) DOUBLING OF ACRES.

The Mill Creek and Lentz & Co. lands, the acquisition of which is complained of, (Additional Brief, pages 5 and 6) comprise at least three-fourths of the Delano Lands, the acquisition of which, as if it were different lands, is complained of in the Additional Brief for U. S., pages 3 and 8.

A. Pardee & Co. lands are the same lands as the Hazleton Coal Company lands, the acquisition of which is complained of on page 3, of the Additional Brief.

J. C. Haydon & Co. lands are the same lands as the Spring Mountain Coal Co. lands, which are complained of by the Government as a part of the acquisition of the Lehigh Coal Co., from the Lehigh Railroad Co.

Seneca Coal Co. lands. About fifty per centum of these lands were fee-lands of the Lehigh Coal Company, and were part of the Everhart lands, and as such are separately included in the complaint of the Government as to acreage acquired from the Everharts.

Righter Coal Company lands are part of the Hazleton Coal Company lands, the whole acreage of which is separately charged against the Lehigh Coal Company (Additional Brief for U. S., page 3.)

Ten hundred sixty-three acres of the Coxe Bros. & Co., Inc., lands are the same lands that are separately complained of by the Government as having been acquired from the Hazleton Coal Company.

SUMMARY.

Ten thousand, three hundred eighty-nine (10,389) acres of land, the acquisition of which is complained of by the Government, are thus figured twice in arriving at the Government's total.

(3) Failure of Government to take into account partial and complete exhaustion, by mining.

In determining whether acquisitions of coal are or are not in line with the normal development of the mining business, it is absolutely necessary to recognize the fact that in the normal progress of the business the coal is continually being exhausted, and that as this continues the control of coal and the power to produce it become less and less, until final exhaustion comes, and then the business is at an end.

Unless, therefore, a mining company desires to continue but a comparatively short time in the business, and during that time to conduct a rapidly

diminishing business, it must acquire from time to time new coal areas to take the places of those which are being mined out.

The total acquisitions during a period of fifty years do not in any way indicate the amount of coal controlled by the acquirer at the end of that period of time.

All of the properties, the acquisition of which by Lehigh Coal Company is complained of by the Government, have been exhausted in varying degrees.

Many of them have very little coal left in them.

Some of them have no coal left, and are now abandoned, so far as mining is concerned.

Even accurate coal acreages, therefore, as distinguished from superficial acreages, do not fairly reflect actual tonnages which can be mined.

That the Court might have for its consideration accurate figures of the total extent of Lehigh Coal Company's ownership and control of anthracite coal, the defendant proved that, taking into account all its acquisitions, it owned or controlled 10.3%—ten and three-tenths per centum—of the coal in the

nearly contiguous mining regions in Pennsylvania known as the Wyoming, Lehigh and Schuylkill.

Record, Vol. III., page 1045.

Exhibit, Vol. IV., pages 2053-2054.

The defendant also proved that it owned or controlled twenty-two and three-tenths (22.3%) per centum of all the coal which was naturally and conveniently tributary to the lines of the railroad company.

Record, Vol. III., page 1040.

Exhibit, Vol. IV., pages 2053-2054.

This proof came from credible sources, and is not disputed by the Government.

No matter, therefore, how formidable a list of acquisitions may appear to be when stated with long names and large superficial acreages, the uncontradicted result, so far as the power to exercise a monopoly is concerned, justifies the language of the learned judge of the District Court that "it cannot be charged * * * that monopoly exists because of the control of so small a portion of anthracite acreages, * * * nor yet in the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers."

Record, Vol. V., page 232.

It is respectfully submitted that the finding of the learned judge of the Court below in his concise summing up of the case,—"No monopoly of interstate commerce is shown, nor any attempt to monopolize, etc.," is a correct finding and warrants the decree which was entered, and ought to be affirmed.

Respectfully submitted,

F. W. Wheaton,

Counsel for Lehigh Coal Company.

October 3, 1919.

UNITED STATES *v.* LEHIGH VALLEY RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1. Argued October 12, 13, 1916; restored to docket for reargument May 21, 1917; reargued November 7, 1917; restored to docket for reargument June 10, 1918; submitted October 7, 1919; restored to docket for oral argument May 17, 1920; reargued October 5, 1920. —Decided December 6, 1920.

Prior to the enactment of the Anti-Trust Law, the Lehigh Valley Railroad Company, in combination with the Lehigh Valley Coal Company, a subsidiary created and operated as a mere agency or instrumentality of the Railroad Company, deliberately entered upon the policy of purchasing and leasing the anthracite coal lands in Pennsylvania tributary to its extensive railroad system, and of buying up the stocks of corporations owning such lands, for the purpose of controlling the mining, transportation and sale of the coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce. This policy was continued after the enactment of the Anti-Trust Act, with the result that a practical monopoly was attained of the transportation and sale of the anthracite derived from the lands tributary to the railroad, the amount so transported coming to exceed one-fifth of the entire annual anthracite production of the country. Considering this result, the methods employed in

achieving it, and the great volume of production and trade involved, as compared with the restricted area of the whole anthracite territory, *held*, that the combination effected a restraint of trade or commerce among the States and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, within the meaning of the first and second sections of the Anti-Trust Act. P. 269.

For the purpose of divesting itself in appearance of interest in the coal transported, the Railroad Company, with the Coal Company, brought about the creation and organization of a Sales Company, whose stock was subscribed for by stockholders of the Railroad Company only, with the aid of a dividend declared by that company for the purpose, and whose management was largely made up of former agents and officials of the Railroad and Coal Companies; the Sales Company, thereupon, in pursuance of the plan, made, in form, an agreement with the Coal Company, for a term of ten years but subject to termination by either party on six months' notice, by which the Coal Company agreed to sell and the Sales Company to buy all coal mined or produced by the Coal Company, at prices mostly fixed at a specified percentage of New York prices, and by which the Coal Company agreed to lease all of its facilities, structures and trestles to the Sales Company, and the Sales Company was inhibited from buying any coal except from the Coal Company and from selling any not so purchased. *Held*, that the Sales Company was neither an independent buyer nor a free agent, and that the contract being a mere device to evade the commodities clause of the Interstate Commerce Act, and obnoxious also to the Anti-Trust Act, was void. *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. P. 264.

225 Fed. Rep. 399, reversed.

THE case is stated in the opinion. A motion to modify the decree was made and denied at this term. Post, 617.

The Solicitor General for the United States.[1]

[1] At the first and second hearings the case was argued by *Mr. Solicitor General Davis* and *Mr. Assistant to the Attorney General Todd*. *Mr. Attorney General Gregory* and *Mr. Arthur W. Machen, Jr.*, Special Assistant to the Attorney General, were also on the brief. At the third hearing the case was submitted by *Mr. Attorney General Palmer* and *Mr. Solicitor General King*, on an additional brief.

Mr. Edgar H. Boles for Lehigh Valley Railroad Company, Delaware, Susquehanna & Schuylkill Railroad Company, and the individual defendants.[1]

Mr. F. W. Wheaton, with whom *Mr. Allan McCulloh* was on the briefs, for Lehigh Valley Coal Company and Coxe Brothers & Company, Inc.

Mr. Nicholas W. Hacker, with whom *Mr. Everett Warren* was on the briefs, for Lehigh Valley Coal Sales Company.

Mr. E. V. B. Getty filed a brief on behalf of the G. B. Markle Company.

Mr. John Hampton Barnes and *Mr. Elihu Root, Jr.*, filed a brief on behalf of the Girard Trust Company.

Mr. Justice Clarke delivered the opinion of the court.

This is an appeal from a decree entered in a suit to dissolve the intercorporate relations existing at the time it was commenced in March, 1914, between the defendant corporations, other than Girard Trust Company, for the reason, it is averred, that they were so united that they constituted a combination in restraint of interstate trade and commerce in anthracite coal and an attempt to monopolize and an actual monopolization of a part of such commerce, in violation of the Anti-Trust Act of Congress of July 2, 1890, c. 647, 26 Stat. 209; and also for the alleged reason that the Lehigh Valley Railroad Company was transporting over its lines of railway anthracite coal in which it had an interest, in violation of the Commodities Clause of the Act of June 29, 1906, c. 3591, 34 Stat. 585.

[1] At the first hearing the case was argued by *Mr. John G. Johnson* and *Mr. Edgar H. Boles*. At the second hearing it was argued by *Mr. Edgar H. Boles*, who also submitted at the third hearing.

It will be necessary to consider only the relations and activities of the Lehigh Valley Railroad Company, hereinafter designated the Railroad Company, the Lehigh Valley Coal Company, designated the Coal Company, and the Lehigh Valley Coal Sales Company, designated the Sales Company.

A condensed history, chiefly admitted, of the organization, stock ownership and conduct of these three companies, and the application to the facts thus developed of fully established principles of law, will be decisive of the case.

The limited area of anthracite-producing territory, its relation to the interstate transportation system and markets of our country and the various attempts to monopolize and control the great railway tonnage originating therein have all been so often described in reported cases, that they need not be repeated here in detail.[1]

It will suffice for our present purpose to say that the anthracite-producing territory is very restricted in area, it all being within seven counties of eastern Pennsylvania with the known deposits underlying only 309,760 acres of land. For trade purposes it is divided into three fields, the northerly is called the Wyoming field, the next southerly the Lehigh or Middle field and the southerly the Schuylkill field. The lines of the Railroad Company extend into the Wyoming and Lehigh fields but to only one colliery in the Schuylkill field. Much the greater part of its tonnage is derived from the Wyoming field, and four-fifths of it moves in interstate commerce.

The Railroad Company in 1913 owned 1438 miles of main line and a total trackage of 3354 miles, its capital

[1] *United States* v. *Reading Co.*, 183 Fed. Rep. 427; *United States* v. *Reading Co.*, 226 Fed. Rep. 229; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Reading Co.*, 253 U. S. 26.

stock was $60,600,000, its funded debt was $85,800,000, its total assets had a book value of $182,700,000, but a much greater actual value, and it carried a larger tonnage of anthracite coal than any other railroad in the country—over 13,000,000 tons in 1913, this being 18.84% of the total 69,000,000 tons shipped over all railroads in that year.

In 1864 the Railroad Company by merger with a coal company acquired a small acreage of anthracite-containing land and thereupon added the mining, shipping and selling of coal to its duties as a carrier.

The annual reports of the Railroad Company show that, as early as 1868, it entered upon the policy of acquiring by purchase and lease the control of as much as possible of the anthracite coal-containing lands tributary to its lines of railroad for the purpose of preventing, or, when it had become established of suppressing, competition in the carrying of coal over its interstate lines to interstate markets.

Thus the annual report of the Company for 1868 shows that, it having been determined that it was of "the utmost importance" to the future welfare of the company to secure "control of tonnage for our roads from regions having other outlets to market," the Company, by merger of two coal companies, obtained coal lands which secured to it the whole trade of the Hazelton Coal field and "the withdrawal from competition" of a business so large as to greatly strengthen the "future prospects of our road."

In 1869 the policy of securing a proportion of the coal trade from each region by the purchase of interests in companies owning lands on or near the several branches of the company was approved and "continued."

In 1871 it is reported, "We have continued to acquire interests in coal lands situated in our various regions."

In 1872, after detailing the purchase for $2,000,000 of 5800 acres of land having upon it ten collieries, the report of the Company declares that, "Should there be a corre-

sponding increase for a year or two more the total consumption will so nearly equal the full capacity of the mines for production as to *render unnecessary all attempts to regulate or control the trade.*"

After reciting that a contract had been entered into granting to the Delaware, Susquehanna & Schuylkill Railroad Company trackage rights to tidewater, the report of the Railroad Company for 1894 continues, saying that there is thereby assured to the Company "an important traffic . . . for which several outlets existed and which had been in contention for some time previously. It also removed an incentive to the construction of further new lines into the territory tributary to the Lehigh Valley System."

Although in 1875 it caused the Coal Company (hereinafter discussed) to be organized for the purpose of taking title to coal lands then owned or which might thereafter be purchased, and although the Anti-Trust Law was enacted in 1890, nevertheless, the Railroad Company continued its policy of purchasing for control and from time to time it acquired and took in its own name the title to extensive tracts of coal lands and to stocks in coal companies. Thus in 1885 it acquired the entire capital stock of the Wyoming Valley Coal Company, the owner of 1657 acres of anthracite land, in 1900 it acquired the entire capital stock of the Westwood Coal Company, a considerable owner of anthracite land, in 1901 it acquired the entire capital stock of the Connell Coal Company, and in the same year the entire capital stock of the Seneca Coal Company, the owner of 1308 acres of anthracite land.

In the years prior to 1905 the Railroad Company made a number of other purchases of coal land, but in that year it made its largest single and most significant purchase, when it acquired, for the sum of $17,440,000, all of the capital stock of Coxe Brothers & Company, Inc. This company was the largest independent coal operator then

on the line of the Railroad Company, and its production for 1905 exceeded 1,100,000 tons. It not only owned extensive areas of coal land, on which were located eight collieries, but it was also owner of all of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, which owned fifty miles of railway which served other large independent mines in addition to those of Coxe Brothers & Company, Inc. This railroad had connections with the Reading, Pennsylvania and New Jersey Central lines, which were taken up or fell into disuse when the control of it passed to the defendant Lehigh Valley Railroad Company. The Railroad Company continued to own all the capital stock of Coxe Brothers & Company, Inc., to the time the testimony was taken in this suit and it is admitted that that company then held in fee or under long lease 36,490 acres of land in the anthracite field, 7,169 acres of which were known to contain anthracite coal. This purchase was confessedly made to prevent the diversion of traffic to other lines, and, while the company was continued in form as a separate corporation, the officers and directors of the Coal Company were made its officers and directors, and in June following the year of the purchase its directors by resolution provided that the net earnings of the company should be paid to the Railroad Company without the formality of declaring a dividend, and this practice continued until 1911.

Thus, this important Coal Company and its railroad became a mere coal-producing and transporting agency of the defendant Railroad Company.

In 1874 the State of Pennsylvania adopted a constitution containing the provision that:

"No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works." (Constitution of Pennsylvania, 1874, Art. 17, § 5.)

Prior to this time the Railroad Company had been a large owner, miner, shipper and seller, as well as carrier, of anthracite coal and, as if for the purpose of complying with the new constitution of the State from which it derived its franchise, it caused the Lehigh Valley Coal Company to be created in 1875 by the consolidation of two smaller companies. This company, which was organized for the purpose of taking title to coal lands and stocks in coal companies, then owned or thereafter to be acquired by the Railroad Company, and to conduct the business of mining, shipping and selling coal, had an original capital of $650,000, which was afterwards increased to $1,965,000, all of which has been owned by the Railroad Company from the beginning. Coal-producing lands and stocks in various coal companies were purchased from time to time by the Railroad Company, directly or through advances of money to the new coal company for that purpose, title thereto being taken in the Coal Company, with the result: that when this suit was commenced that company admitted itself to be the owner of 54,229 acres of land in the anthracite-producing regions, of which 24,748 acres were located along the lines of the Railroad Company; that the funded debt of the company had become $20,000,000; and that the value of its assets amounted to about $35,000,000. Eight and one-half million tons of anthracite, of the thirteen millions carried by the Railroad Company in 1913, were produced by this Coal Company and by Coxe Brothers & Company, Inc., owned, as we have seen, by the Railroad Company. The combined acreage of lands owned by the Coal Company and by Coxe Brothers & Company, Inc., is admitted to be 90,719 acres, of which 61,238 acres are located along the lines of the Railroad Company. The annual reports of the Coal Company show that in 1903 56.77% of the coal transported over the Railroad was produced by the Coal Company and its affiliated companies; that in 1906 the percentage produced and pur-

chased was 85.25% of that transported; and in 1907 it was 87.11%. The Interstate Commerce Commission found that in 1908 the company controlled 95% of the tonnage moving over its line to tidewater. *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 21 I. C. C. 129, 154.

The Railroad Company and the Coal Company had usually the same president, secretary, treasurer and auditor, and the latter company admits, as it must, that the Railroad Company "as the owner of stock controls and long since has been controlling the election of its directors." The Railroad Company constantly advanced large sums of money to the Coal Company for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000, which amount, however, was reduced by operations of the Coal Company to $11,500,000. The Coal Company never paid any dividends, its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies were so intimate and interlaced that in argument it is admitted that "in the last analysis the assets of the Coal Company are the assets of the Railroad Company."

There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy, that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railroad Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and in combination with its agency, the Coal Company, was consistently pursued, with in-

creasing energy and scope after the passage of the Anti-Trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company and by the functions which it performed—which remain to be considered.

On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company "to consider the propriety of organizing a coal sales company" and of entering into a contract with it when formed "for a limited time" for the purchase and sale by it "of the coal mined, purchased and owned by the Coal Company." The board also requested that the privilege of subscribing for the stock of the n company be extended, "not to the Railroad Company, but, pro rata, to the common and preferred stockholders of the Railroad Company." As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous in perfecting the sales arrangement with the new company to be organized, and in aid of the enterprise a dividend of ten per cent. on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

On the same day the board of directors of the Coal Company resolved: that the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should, "if possible," contract with it for a "limited time" for the sale to it "of all coal which shall be mined, purchased, owned or acquired" by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales

Company "before the transportation thereof shall be commenced."

The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

The Sales Company was promptly organized and the minutes of the company show that slightly less than 97% of the stock was subscribed for by stockholders of the Railroad Company.

The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R. Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company, and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice president of the company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

It is too plain for discussion that with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making a contract with itself, the terms of which it could determine in its discretion.

Immediately after the organization of the Sales Company, the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for ten years unless terminated in the manner which it provides for, and its terms are so nearly identical with the earlier Lackawanna contract, which is considered in *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, that the judge who tried this case below, with

entire propriety, says that the differences between the two are "wholly unsubstantial" (225 Fed. Rep. 401). This court held that the contract in the *Lackawanna Case* was void because violative of the provisions of the Anti-Trust Act and the Commodities Clause of the Act to Regulate Commerce.

The discussion of the Lackawanna contract is so full and satisfactory in 238 U. S. 516, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the provisions of the Lackawanna contract, which were clearly determinative of the former decision by this court, are plainly the same in substance, and almost exactly the same in form, as those in the contract we are considering, viz: The agreement (1) of the Coal Company to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; (2) that the prices to be paid for the more important grades of coal shall be sixty-five per cent. of the New York prices—the two contracts are in precisely the same words in this respect; (3) that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that "purchased" from the Coal Company; (4) that the Coal Company shall lease all of its facilities, structures and trestles to the Sales Company; (5) that either party shall have the right to abrogate and cancel the contract upon giving to the other six months' notice of its desire so to do; (6) that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911 in addition to that which it mined.

These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we have

here,—subject to be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated—was neither an "independent buyer nor a free agent."

Being entirely satisfied with the reasoning upon which the *Lackawanna Case* proceeds to its conclusion, we hold now, as it was there in principle held: that the purchase in form by the Sales Company did not so dissociate the Railroad Company from the transportation of coal in which it was interested as to meet the requirements of the law, that the contract, nominally of purchase, was so calculated to restrain interstate trade as to be obnoxious to the Anti-Trust Act of Congress, and that for this reason it is unlawful and void.

It will be of service in determining the purposes of the defendant Railroad Company with its corporate subsidiaries in the activities thus discussed, to recall the history of the defendant Railroad Company, as it appears in the decisions of this and of other courts.

In 1892 the defendant Railroad Company and the Central Railroad Company of New Jersey leased their lines of railway for the term of 999 years to the Reading Railroad Company, a parallel competing carrier, extensively engaged in mining, marketing and selling anthracite coal. This combination, had it become operative, would have gone far toward monopolizing the interstate transportation and trade in anthracite coal of our entire country, but all operations under the lease of the Central Railroad Company of New Jersey were enjoined by the New Jersey courts, for the reason that it was deemed to be in restraint of trade, against public policy and calculated to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the State. *Stockton* v. *Central R. R. Co.*, 50 N. J. Eq. 52. Thereupon the lease of defendant's property was abandoned and surrendered.

Six years later, in 1898, the defendant Railroad Company combined with the Reading and four other railway companies to contribute a large sum of money, which was successfully used to prevent the construction of a projected, competing line of railroad from the anthracite fields to tidewater. Of this enterprise this court said: "We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the Act of Congress of July 2, 1890." *United States* v. *Reading Co.*, 226 U. S. 324, 355.

Four years later, in 1902, the defendant Railroad Company united with the Reading and four other anthracite carriers in a combination to control the entire tonnage of coal produced by independent operators along the lines of their respective railways. The device this time resorted to was a contract to purchase all the coal produced by independent mines, then opened or which might thereafter be opened by the vendors, and to pay therefor sixty-five per cent. of the market price prevailing at tidewater points at New York, to be computed from month to month by an arbitrator to be selected by agreement. These contracts were elaborately considered and unsparingly condemned by this court in the case which is cited, and the conclusion reached was that the defendants in that case had unlawfully combined, by and through the instrumentality of the sixty-five per cent. contract, for the purpose of controlling the sale at tidewater of the independent output of anthracite coal. The contracts were declared to be unlawful and were ordered cancelled. 226 U. S. 370, 371, 373.

In 1911, in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 21 I. C. C. 129, 154, 163, the Interstate Commerce Commission held that the only line of demarkation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company was one of bookkeeping; that the Rail-

road Company had "monopolized the coal field served by it" and that it had been guilty of unjust discrimination and of charging unreasonable rates for which reparation was awarded. 23 I. C. C. 480. This decision was sustained by this court in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412.

And yet again, in 1915, the Interstate Commerce Commission, after an investigation extending over three years, in which the defendant Railroad Company and all other initial carriers of anthracite were parties, held that the rates charged by the defendant and other carriers to tidewater and to certain interior points were unreasonable; that by trackage and other arrangements they had extended advantages to their subsidiary coal companies, to the prejudice of other shippers; and that concessions as obnoxious as "direct cash rebates" had been made to such coal companies. *In the Matter of Rates, Practice, Rules, and Regulations Governing the Transportation of Anthracite Coal*, 35 I. C. C. 220.

This history of almost twenty-five years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 76.

Without further comment, this discussion of the record requires us to conclude that it is clearly established that prior to the enactment of the Anti-Trust Act, the Railroad Company, in combination with its coal company subsidiary, deliberately entered upon a policy of making extensive purchases of anthracite land tributary to the Railroad Company's lines, for the purpose of controlling the mining, transportation and sale of coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a

practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.

The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one-fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several States and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-Trust Act as they have frequently been interpreted by this court. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 61; *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 392, 393; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 533; *United States* v. *Reading Co.*, 253 U. S. 26.

Since we have also found that the contract between the Coal Company and the Sales Company was a mere device to evade the Commodities Clause of the Interstate Commerce Act and therefore void, it results that the decree of the District Court must be reversed and the case remanded with instructions to enter a decree, in conformity with this opinion, dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., the Delaware, Susquehanna & Schuylkill Railroad Company and the Lehigh Valley Coal Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all property

of any character, of any one of said companies owned or in any manner controlled by any other of them as may be necessary to establish their entire independence of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company must be decreed to be void and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business of buying and selling coal where and from and to whom it chooses with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company.

As to the New York & Middle Coal Field Railroad & Coal Company, the G. B. Markle Company, the Girard Trust Company and the individual defendants, the bill must be dismissed.

Reversed and remanded with instructions to enter a decree in conformity with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE HOLMES, while if they exercised an independent judgment would be for affirmance, nevertheless concur in the conclusion now announced by the court because they consider that they are so constrained to do in virtue of the controlling effect of the previous decisions in the *Lackawanna* and *Reading Cases* cited in the opinion of the court.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS did not take part in the consideration and decision of this case.